92-1367

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NEW CASTLE COUNTY,
Petitioner,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut Corporation, *et al.*,
Defendants,

and

CONTINENTAL CASUALTY COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should resolve the existing conflict among the circuit courts of appeals, and the conflict within the Third Circuit, regarding whether a federal court, sitting in diversity, must consider a relevant lower state court opinion, regardless of whether the lower state court's opinion is final, when that opinion is the only declaration of the applicable state's law?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were petitioner New Castle County, Delaware,* as plaintiff, and respondent Continental Casualty Company, as defendant.

Eleven other insurance company defendants in the district court either were dismissed or settled with petitioner before trial, and were not parties in the proceedings as to which petitioner seeks a writ of *certiorari*. Those companies are Hartford Accident & Indemnity Company, The Home Insurance Company, New Hampshire Insurance Company, United States Fire Insurance Company, Insurance Company of North America, Continental Insurance Company, United States Liability Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, Twin City Fire Insurance Company, Aetna Casualty & Surety Company, and Zurich Insurance Company.**

In addition, the United States Court of Appeals for the Third Circuit granted the motions to appear and file briefs as *amici curiae* of the Insurance Environmental Litigation Association, E.I. Du Pont de Nemours & Company, ICI Americas Inc., International Business Machines Corporation, Olin Corporation, The American Petroleum Institute, The American Fiber Manufacturers Association, and the Chemical Manufacturers Association.

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* Petitioner has no parent company and no subsidiaries.

** However, five of those companies (The Home Insurance Company, United States Fire Insurance Company, Insurance Company of North America, United States Liability Insurance Company, and Aetna Casualty & Surety Company), have been served with this petition, because Continental Casualty Company filed cross-claims against those companies, which were mooted by the decision as to which petitioner seeks a writ of *certiorari*.

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PETITION FOR WRIT OF CERTIORARI

Petitioner New Castle County ("the County") respectfully requests that a writ of *certiorari* be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in *New Castle County v. Hartford Accident & Indemnity Co.*, 970 F.2d 1267 (3d Cir. 1992) ("*New Castle VII*").

OPINIONS BELOW

The opinions of the district court on partial summary judgment motions, and after a 1989 trial of remaining factual issues, are reported at 673 F. Supp. 1359 (D. Del. 1987) ("*New Castle I*"); 685 F. Supp. 1321 (D. Del. 1988) ("*New Castle II*"); 725 F. Supp. 800 (D. Del.

1989) ("*New Castle III*"); and 728 F. Supp. 324 (D. Del. 1989) ("*New Castle IV*"). Respondent Continental Casualty Company ("CNA") appealed portions of *New Castle I* and *New Castle III*, and the decision in favor of the County in *New Castle IV*, to the Third Circuit Court of Appeals. *See New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991) ("*New Castle V*").

In *New Castle V*, the Third Circuit in 1991 affirmed the district court in part, reversed in part, and remanded the case to the district court. The district court decided in favor of the County on remand in November 1991. *See New Castle County v. Hartford Accident & Indem. Co.*, 778 F. Supp. 812 (D. Del. 1991) ("*New Castle VI*"). CNA appealed *New Castle VI* to the Third Circuit Court of Appeals, which reversed the decision of the trial court on July 28, 1992, *as amended* August 4, 1992. *See New Castle VII*, 970 F.2d at 1273. The County filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* in the Third Circuit on August 11, 1992. That petition was denied on November 18, 1992. The opinions in *New Castle VI* and *New Castle VII* are reprinted in the Appendix hereto.

JURISDICTION

This is a petition for review of the Third Circuit's July 28, 1992 decision in this diversity case. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on November 18, 1992, and this Petition for Writ of *Certiorari* was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (Supp. 1992).

STATEMENT OF THE CASE

A. Material Facts

This is an environmental insurance coverage case involving a municipal sanitary landfill. The ultimate issue is whether CNA (which sold comprehensive general lia-

bility insurance to the County), or the County's taxpayers, must pay in excess of six million dollars to clean up unexpected environmental damage caused by the landfill. The County did not know that the landfill would cause environmental pollution.

Many federal and state courts currently have similar actions pending between policyholders and insurance companies. Those actions are addressing whether standard-form liability insurance contracts, such as those at issue here, obligate the insurance companies to pay the costs to defend policyholders, and to pay policyholders' legal liability, in connection with environmental damage claims. Those actions involve important issues, and hundreds of millions, if not billions, of dollars.

The municipal landfill in this case is located in New Castle County, Delaware, at Tybouts Corner ("the Tybouts site"). The County leased the land in 1968, and designed the landfill to be a reclamation project, whereby municipal refuse was used to fill in or reclaim land that was otherwise unusable because of prior sand and gravel extraction operations. *New Castle III*, 725 F. Supp. at 803.

Delaware had no permitting requirements for landfills when the County leased the Tybouts site. Nonetheless, the County voluntarily agreed to comply with proposed draft landfill regulations, and to obtain permits from the Delaware State Board of Health ("Board of Health") and the Delaware Water and Air Resources Commission ("WARC") for the Tybouts site. *Id.* at 805.[1] Those

[1] The proposed regulations required the submission of "a series of soil borings, taken to the depth of the groundwater table and sufficient in number to give a valid indication of the underlying conditions," and other information about the site. Before these requirements, the State of Delaware ("the State") had virtually no regulations governing solid waste disposal except for general public health laws relating to control of potential nuisances, such as blowing paper, rats, and sea gulls. *Id.* at 804.

regulations did not even mention the term "leachate" (a liquid substance created when precipitation filters through a landfill). *Id.* at 804.

The design and operation of the Tybouts site was based on then-existing state-of-the-art landfill specifications. When operations began at the site, experts believed that precipitation filtration through the refuse and underlying soil layers of the site would result in the discharge of potable water from the site as the sole leachate. Pollution was not expected. *Id.* at 804.

While applying for the Board of Health and WARC permits, the County investigated the site and consulted with experts, including Delaware state officials and University of Delaware scientists. *Id.* The County relied upon those experts in the evaluation of all site information, because it had no expertise of its own in hydrogeology, soils, or water analysis. *Id.*[2] WARC reported to the County that the State thought Tybouts would be a "model" landfill. *New Castle III*, 725 F. Supp. at 805-06.

The Tybouts site was open from January 1969 through July 1971, when it became full. In accordance with the Board of Health and WARC permits, the Board of Health and WARC inspected the site on a regular basis. In addition, the Board of Health and WARC had the authority to require corrective action or to close the landfill. The County operated the Tybouts site pursuant to permits from the State for the entire period that the site was open.

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[2] The County submitted substantially more data to the State than was required to obtain permits. *New Castle III*, 725 F. Supp. at 804-05. The County drilled more soil borings than were required, either by the draft regulations or by current standards. *Id.* at 804. Some borings were drilled deeper than was required. *Id.* Based on the borings, the County's draftsmen prepared cross-section diagrams of the soil, which also were not required, to assist the State in reviewing the data. *Id.*

The permits required the University of Delaware to conduct a research and testing program to monitor groundwater quality under the site. The University regularly sent the test results to the State and the County. Throughout the period of operation, those reports indicated that leachate from the site was not contaminating groundwater under the site. In fact, the tests affirmed that groundwater under the site remained within federal drinking water standards, and the trial court found that it was "eminently reasonable for the County to conclude, based on [the University of Delaware] test results, that Tybouts posed no risk to surrounding properties." *New Castle III*, 725 F. Supp. at 815.

The County purchased two primary and two excess comprehensive general liability ("CGL") insurance policies from CNA. CNA's primary liability insurance policies were effective from August 1, 1973 to July 1, 1974, and from July 1, 1974 until January 1, 1975, respectively, and provided liability limits of $1 million per "occurrence."[3] CNA's excess liability insurance policies were effective from May 11, 1973 to July 1, 1974, and from July 1, 1974 until July 1, 1975, respectively, and provided liability limits of $5 million per "occurrence." *New Castle III*, 725 F. Supp. at 807-08.

Three actions subsequently were filed against the County which alleged bodily injury and/or property damage arising out of the operation of the Tybouts site. The first action was brought by the United States against the County and others, pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* (Supp. 1992), and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),

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[3] The CNA policies defined an "occurrence" as:

> . . . an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

New Castle I, 673 F. Supp. at 1363 n.5.

42 U.S.C. § 9601 *et seq.* (Supp. 1992). *New Castle III*, 725 F. Supp. at 808; *New Castle V*, 933 F.2d at 1173. That action was settled in 1988.

The other two actions were private actions that were filed against the County by property owners who lived near the site. Those actions were settled in 1992.

B. Procedural Background

1. *The Initial Proceedings in the Trial Court*

The County filed this action in 1985 in Delaware Superior Court against the twelve insurance companies, including CNA, which sold primary and excess CGL insurance policies to the County from the 1960's until the 1980's. The County sought a declaration that the insurance companies were obligated to pay the costs of defense, and to pay for the County's legal liability, in the three actions against the County arising out of the operation of the Tybouts site. The insurance companies removed the case to the United States District Court for the District of Delaware, which had jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) (Supp. 1992).

The trial court issued two opinions on summary judgment. *See New Castle I*, 673 F. Supp. 1359; *New Castle II*, 685 F. Supp. 1321. In *New Castle I*, the trial court interpreted, under the governing Delaware law, the exception portion of the pollution exclusion clause in CNA's policies.[4] The question considered by the court was whether the exception to the pollution exclusion, for "sud-

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[4] The pollution exclusion clause in CNA's policies precludes insurance coverage for:

> bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*

New Castle I, 673 F. Supp. at 1362 n.4 (emphasis added).

den and accidental" pollution damage, applied in this case.

CNA asserted that the exception to the exclusion did not apply on the premise that the environmental damage at issue purportedly was not "sudden," because it took place, unbeknownst to the County, over a period of years.

However, in 1970, when the insurance industry sought approval from state insurance commissioners to include the pollution exclusion in CGL insurance policies, the insurance industry represented that the exclusion was aimed at intentional pollution, and was merely a clarification of the policy definition of "occurrence," which excluded insurance coverage only for damage that was expected or intended from the standpoint of the policyholder. *New Castle I*, 673 F. Supp. at 1363.[5]

Thus, CNA's contention that the exclusion precluded coverage for unexpected gradual pollution was inconsistent with the insurance industry representations to insurance commissioners when the pollution exclusion was approved for use in CGL insurance policies. The trial court, therefore, interpreted the phrase "sudden and accidental" to be consistent with the "occurrence" definition and to mean "unexpected and unintended." *Id.* at 1364.

Prior to trial, all defendants, except CNA, either were dismissed from the action or settled with the County. A seven-day bench trial was held in June of 1989. The trial court ruled that CNA had a duty to pay the costs of the County's defense in the three actions against the County. The trial court also ruled that CNA had a duty to pay for the County's legal liability in the United

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[5] As noted above, the CNA policies defined an "occurrence" as:

> . . . an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

Id. at 1363 n.5.

States' action against the County. *New Castle III*, 725 F. Supp. at 820.[6] Additionally, the trial court reiterated its prior ruling in *New Castle I* that the pollution exclusion did not bar coverage for unexpected gradual pollution, and found that covered "occurrences" took place during CNA's policy periods. *Id.* at 813-16. CNA then appealed the trial court's rulings.

2. *CNA's First Appeal*

CNA appealed the trial court's ruling concerning the pollution exclusion clause. In *New Castle V*, the Third Circuit affirmed the trial court's ruling that the pollution exclusion did not exclude coverage for environmental pollution as long as the policyholder did not expect or intend the damage. 933 F.2d at 1198-99.

The Third Circuit also reversed the trial court in part, ruling that the pollution exclusion clause focuses on whether the policyholder expected or intended to discharge "contaminants" or "pollutants," rather than on whether the policyholder expected or intended any property damage from such a discharge. *Id.* at 1203, 1207.

Because the trial court had focused only on the fact that the County did not expect the Tybouts site operation to cause damage, the Third Circuit remanded the case for a determination of whether the County expected to discharge "contaminants." *Id.* Accordingly, on remand, to escape its coverage obligations, CNA bore the burden of proving that the County expected or intended to discharge "contaminants" from the Tybouts site. *Id.* at 1182, 1207.

3. *The Proceedings in the Trial Court on Remand*

In June of 1991, the County and CNA proposed, and the trial court agreed, that the issue on remand could be resolved on the existing record. CNA contended that, because leachate from the Tybouts site recently had come to

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[6] The County did not seek a ruling at trial regarding the indemnity issue with respect to the two private actions. *Id.* at 819.

be considered a "contaminant," CNA's policies did not provide insurance coverage for liability resulting from that leachate. After briefing and oral argument, the trial court determined that CNA had failed to meet its burden of proof.

The trial court ruled, as a matter of Delaware law, that whether the leachate should be considered a "contaminant," within the meaning of the pollution exclusion, turned on the knowledge of what was a contaminant that existed as of the time of contract formation, not the knowledge that existed years later, when a dispute under the contracts arose. *New Castle VI*, 778 F. Supp. at 819-20. The trial court also made a factual finding that, at the time of contracting, the County did not know that the leachate released from the Tybouts site contained any "contaminants" within the meaning of CNA's policies. Accordingly, the trial court ruled that the pollution exclusion did not exclude coverage. *Id.* at 817-18. CNA appealed *New Castle VI* on December 2, 1991.

4. *CNA's Second Appeal*

After CNA filed its second appeal to the Third Circuit, but before briefing in the Third Circuit, in a comprehensive 54-page decision, the Delaware Superior Court adopted the reasoning of *New Castle VI* in an environmental insurance coverage case involving *the same Tybouts site* at issue in this case. *See National Union Fire Ins. Co. of Pittsburgh, Pa. v. Rhone-Poulenc Basic Chems. Co.*, No. 87C-SE-11, slip op. at 50-51 (Del. Super. Ct. Jan. 16, 1992) ("*Rhone-Poulenc*") (reproduced in the Appendix hereto). The Delaware Superior Court ruled that the standard-form CGL insurance contract at issue in *Rhone-Poulenc*, which contains substantially the same provisions as CNA's contracts in this case, did not preclude coverage if the policyholder did not know, at the time of contracting, that the substances at issue at the Tybouts site were harmful. *Rhone-Poulenc*, No. 87C-SE-11, slip op. at 43, 49-50.

Oral argument on CNA's second appeal to the Third Circuit was held on June 18, 1992, before Circuit Judges Nygaard and Greenberg, and District Judge Pollak. In an opinion which cannot be reconciled with Delaware law as set forth in *Rhone-Poulenc*, that panel reversed the district court, without even citing *Rhone-Poulenc*.

Ignoring the recent, contrary decision in *Rhone-Poulenc*, the Third Circuit in *New Castle VII* ruled that the term "contaminants" in the pollution exclusion clause could be construed without reference to the knowledge existing at the time of contract formation and that, in this case, the exclusion precluded coverage for liability arising out of discharged leachate, even though the County did not know that the leachate contained a harmful substance (*i.e.*, a contaminant) until well after CNA's policies had expired. 970 F.2d at 1271-73.

Thus, this diversity case presents a remarkable scenario. The district court opinion, which found in the County's favor, was adopted by a Delaware state court as a correct expression of Delaware law. That opinion later was reversed by the Third Circuit, which ignored the intervening Delaware state court opinion, apparently on the ground that the opinion was interlocutory. Therefore, if this case had not been removed by the insurance companies to the federal district court from the Delaware state court, where the County originally had filed it, the County ultimately may have prevailed.

On August 11, 1992, the County filed a timely petition for rehearing in the Third Circuit. On November 18, 1992, that petition was denied. The County now seeks a writ of *certiorari* to the United States Court of Appeals for the Third Circuit.

REASONS FOR GRANTING THE WRIT

This diversity case presents an important and far-reaching issue which has given rise to a conflict among the United States Circuit Courts of Appeals, and a conflict within the Third Circuit, and which never has been addressed by this Court. That issue is whether a federal court sitting in diversity may, under *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940) (*"West"*), and *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940) (*"Fidelity Union"*),[7] completely ignore a highly pertinent state court decision, simply because that decision is interlocutory, when predicting how the highest state court would rule. In this case, the Third Circuit did just that. It failed even to mention the relevant, non-final Delaware Superior Court decision, involving the same factual circumstances, in *Rhone-Poulenc*, which cited with approval the decision then under review by the Third Circuit, and was the only relevant Delaware state court decision. Under *West* and *Fidelity Union*, where an applicable state's highest court has not yet ruled on an issue, a federal court exercising diversity jurisdiction is required to defer to the relevant rulings of state courts immediately below the state's highest court, unless there is "persuasive data" that the state's highest court would rule otherwise. *West*, 311 U.S. at 237; *accord Fidelity Union*, 311 U.S. at 177-79.

This Court has not addressed how a federal court sitting in diversity should treat non-final lower state court decisions that are the only relevant statement of state

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[7] *West* involved the deference due to an intermediate appellate state court decision. However, in *Fidelity Union*, this Court considered decisions of a New Jersey trial court, and held that *West* also applied to decisions of a trial court, where an appeal from that court is taken directly to the highest state court. *Fidelity Union*, 311 U.S. at 178-79. The Delaware Superior Court is a court of state-wide jurisdiction, and Delaware has no intermediate courts of appeal. Like the decisions in *Fidelity Union*, decisions of the Delaware Superior Court are appealed directly to the highest court of the state. *See* Del. Const. of 1897, Art. IV § 7.

law. In the absence of guidance from this Court, federal courts sitting in diversity have given conflicting treatment to such relevant, non-final lower state court decisions.

The Second, Fourth, Seventh, and Ninth United States Circuit Courts of Appeals have ruled that, even if a relevant lower state court decision is not final, *West* controls and federal courts are "not free to reject the state rule merely because it has not received the sanction of the highest state court." *West*, 311 U.S. at 236.[8] In direct contrast, the Third Circuit in this case ignored a relevant, non-final lower state court decision, in predicting how Delaware's highest court would rule. Thus, there is a conflict among the circuit courts on this issue.

Further, an earlier opinion of the Third Circuit indicates that there is a conflict on this issue even within the Third Circuit. In *Hamme v. Dreis & Krumpf Mfg. Co.*, 716 F.2d 152 (3d Cir. 1983) (*"Hamme"*), the three panel members each favored a different approach to the question, and the panel ultimately decided to give deference to a non-final lower state court opinion. *Id.* at 154-55 n.4, 157.

"One of the prime purposes of [this Court's] certiorari jurisdiction is to bring about uniformity of decisions" among the circuit courts. R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice*, § 4.4 at 197 (6th Ed. 1986). Further, where, as here, an inter-circuit conflict is accompanied by an intra-circuit conflict on a recurring issue, the reasons for granting *certiorari* become even more compelling. *Id.*, § 4.6 at 205.

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[8] See, *e.g.*, *Pentech Int'l, Inc. v. Wall Street Clearing Co.*, Nos. 92-7222, 92-7264, 1779, 1863, 1993 WL 5013 at *4, *5 (2d Cir. Jan. 13, 1993) (*"Pentech"*); *Williams v. First Federal Savings & Loan Association*, 651 F.2d 910, 927 n.37 (4th Cir. 1981) (*"Williams"*); *Giguere v. United States Steel Corp.*, 262 F.2d 189, 193 (7th Cir. 1959), *cert. denied*, 360 U.S. 934 (1959) (*"Giguere"*); *Richardson v. United States*, 841 F.2d 993, 996 (1988), *appeal after remand*, 943 F.2d 1107 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1473 (1992) (*"Richardson"*).

The appropriate treatment by federal courts sitting in diversity of relevant interlocutory precedent from lower state courts is fundamental to the federal system of government. The issue of when, or under what circumstances, a federal court is obligated to consider a rule of law adopted by a lower state court is a frequent, and often critical, issue in diversity cases. This Court should provide guidance to the circuit courts on this issue in order to alleviate the injustice caused by existing practices, which often result in federal court decisions on issues of state law that are inconsistent with lower state court decisions. Thus, a party may obtain a different result on the same issue of state law, depending on whether the party is litigating in federal or state court. That is precisely what happened here and is the very result that this Court was seeking to avoid by its decisions in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938) (*"Erie"*), *West*, and *Fidelity Union*. 311 U.S. at 237; 311 U.S. at 177-78.

ARGUMENT

THIS COURT SHOULD RESOLVE THE INTER-CIRCUIT AND INTRA-CIRCUIT CONFLICTS REGARDING WHETHER, IN A DIVERSITY CASE, A CIRCUIT COURT MUST CONSIDER A RELEVANT INTERLOCUTORY LOWER STATE COURT DECISION THAT IS THE ONLY DECLARATION OF THE APPLICABLE STATE'S LAW

In *Erie*, 304 U.S. at 78-80, this Court held that federal courts in diversity cases must apply state law as expressed by the state's highest court. Two years later, this Court held that, in the absence of relevant precedent from the state's highest court, a federal court sitting in diversity must defer to relevant final precedent from the state courts immediately below the state's highest court, unless there is "persuasive data" that the state's highest court would rule otherwise:

> There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which

> are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances *a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court*, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and *it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule*[.]

West, 311 U.S. at 236-37 (emphasis added, citations omitted); *Fidelity Union*, 311 U.S. at 177-79. *See also Hicks v. Feiock*, 485 U.S. 624, 630 (1988).

In reaching its decision in this case, the Third Circuit ignored the highly relevant, non-final Delaware Superior Court decision in *Rhone-Poulenc*.

In *Rhone-Poulenc*, the Delaware Superior Court interpreted a standard-form insurance contract, which contained substantially the same provisions as those that are at issue here, under analogous facts. Indeed, the *Rhone-Poulenc* court considered whether insurance companies were required, under their standard-form CGL insurance policies, to pay the costs of Rhone-Poulenc's defense for one of the very same actions at issue here—an action filed by the United States against the policyholder in *Rhone-Poulenc*, as well as the County, concerning environmental damage from the Tybouts site. No Delaware Supreme Court decision has addressed these issues.

In its complaint at issue in *Rhone-Poulenc* and in this case, the United States alleged that "known carcinogens" were contained in Rhone-Poulenc's waste and were deposited at the Tybouts site. *Rhone-Poulenc*, No. 87C-SE-11, slip op. at 50. The Delaware Superior Court found that the insurance companies had a duty to pay the costs of Rhone-Poulenc's defense in that action, because "the [underlying] complaint simply does not demonstrate that [Rhone-Poulenc] expected or intended to discharge a

pollutant into or upon the land or any watercourse or body of water[.]" *Id.* at 47.

Rhone-Poulenc was decided prior to the argument to the Third Circuit in this case. It expressly adopted the reasoning of the *New Castle VI* ruling, that insurance coverage for environmental damage is not barred under a CGL insurance policy unless, at the time of contracting, the substance that was discharged was known to be a "contaminant":

> This factor is significant in light of the District Court's conclusion [in *New Castle VI*] that the parties' understanding of the term "contaminant" was *determined by what was recognized as a contaminant at the time the contract was made. New Castle County v. Hartford Acc. & Indem. Co.*, C.A. No. 85-436-JLL, slip op. at 17 (D.Del. Nov. 4, 1991). The court noted that "the risk that a certain substance will later be discovered to be a pollutant is not reasonably foreseeable, it is not the kind of risk that is normally understood to be placed on the insured.["]

Id. at 50 n.46 (emphasis added).[9]

Instead of following *Rhone-Poulenc*—or, indeed, even considering it—the Third Circuit simply ruled that whether the leachate discharged from Tybouts should be considered a "contaminant," under the pollution exclusion clause, should be determined based upon the current understanding of what constitutes a contaminant, rather than upon the understanding of what constituted a contaminant at the time the contracts were executed. *New Castle VII*, 970 F.2d at 1272. As a result of the Third

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[9] Similarly, in *E.I. Du Pont de Nemours & Co. v. Admiral Insurance Co.*, No. 89C-AU-99 (Del. Super. Ct. Sept. 19, 1990), *motion for reconsideration denied* (Jan. 13, 1992) (*"Du Pont"*), the Delaware Superior Court denied the summary judgment sought by the insurance companies, because there were disputed issues of fact as to whether the substances released were known "pollutants," or simply substances used in Du Pont's active manufacturing operations. *Id.*, slip op. at 9-10.

Circuit's apparent determination that it was entitled to ignore *Rhone-Poulenc*, the County was held to have no insurance coverage for its liability arising out of the Tybouts site.

The *Rhone-Poulenc* decision, although not final, remains the law of the case in that pending litigation. Further, there is no indication that the Delaware Supreme Court would rule contrary to the decision in *Rhone-Poulenc*.[10] Accordingly, under *West* and *Fidelity Union*, the Third Circuit was not entitled to ignore the *Rhone-Poulenc* decision simply because the lower state court decision is not final.[11]

West and its companion cases involved lower state court decisions that were final. This Court has not yet resolved whether federal courts sitting in diversity are required, under *West* and *Fidelity Union*, to consider relevant lower state court decisions that are not final at the time of the federal court's decision when there is no ruling from the state's highest court. There is a conflict among the decisions of the circuit courts that have been presented with this situation.

The Second, Fourth, Seventh, and Ninth Circuits have followed relevant, non-final lower state court decisions

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[10] Indeed, the Delaware Supreme Court previously accepted an interlocutory appeal regarding another issue decided in *Rhone-Poulenc*, and affirmed the Delaware Superior Court's ruling on that issue. *See Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192 (Del. 1992).

[11] The Third Circuit's decision to ignore *Rhone-Poulenc* is assumed to be based on the interlocutory status of that decision, since the Third Circuit previously has considered final lower state court decisions in situations where the applicable state's highest court had not ruled. *See, e.g., Lomax v. Nationwide Ins. Co.*, 964 F.2d 1343, 1345, 1347 (3d Cir. 1992); *Northern Ins. Co. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 192 (3d Cir. 1991); *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (1985), *aff'd*, 812 F.2d 81 (3d Cir 1987); *Commercial Union Ins. Co. v. Bituminous Casualty Co.*, 851 F.2d 98, 100-01 (3d Cir. 1988), *on remand*, No. CIV. 87-325, 1989 WL 5818 (D.N.J. Jan. 25, 1989).

under *West* and *Fidelity Union*.[12] By contrast, as shown above, the Third Circuit completely ignored a relevant interlocutory decision of the applicable state's lower court.[13]

In the recent *Pentech* decision, the Second Circuit, citing *West*, followed a relevant decision of a lower state court, despite the fact that the state court proceeding had not yet resulted in a final judgment. *Id.* at *4.

Additionally, the Fourth Circuit followed an interlocutory decision of a Virginia trial court in *Williams*. 651 F.2d at 927 n.37. Moreover, the Fourth Circuit followed the holding of the Virginia Circuit Court despite the fact that an appeal was pending in that case to the Virginia Supreme Court:

> It is only the [lower state court] case's lack of finality because of the pending appeal which prevents us from giving preclusive effect in this matter of state law. However, for the reasons we have advanced, the case appears to have been rightly decided.

Id. (citing *West* and its companion cases).

Similarly, in *Giguere*, the Seventh Circuit applied the decision of an Illinois appellate court, despite having been informed that discretionary review had been granted by the Illinois Supreme Court:

> On oral argument, counsel informed us that the Supreme Court of Illinois has permitted an appeal in the Rylander case. Nevertheless, we do not feel it advisable that we should hold up the decision of the case at bar until such time as the Illinois Supreme Court may decide the Rylander appeal. We do not

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[12] *See, e.g., Pentech*, at *4; *Williams*, 651 F.2d at 927 n.37; *Giguere*, 262 F.2d at 193; *Richardson*, 841 F.2d at 996.

[13] It is unclear whether other circuits also have taken this approach. Absent an express statement by a court that it is not considering a relevant lower state court decision on the ground that it is interlocutory, there is no reasonable way to determine whether other courts also have ignored relevant interlocutory lower state court opinions.

> know of any persuasive data which would lead us to believe that the Illinois Supreme Court would reverse the Rylander decision. West v. American Telephone & Telegraph Company, 311 U.S. 223, 236, 237, 61 S.Ct. 179, 85 L.Ed. 139.

262 F.2d at 193. The court thus determined that, absent persuasive data indicating that the highest state court would rule otherwise, it would apply a lower state court decision that was not yet final.

Finally, in *Richardson*, the Ninth Circuit held that the district court erred in following the Ninth Circuit's prior decision in the same action as "law of the case," when a Washington state appellate court since had held, in an interlocutory decision, that the Ninth Circuit's prior decision was an incorrect interpretation of Washington law. The Ninth Circuit held that there should be an exception to the "law of the case" doctrine "where there has been a dispositive intervening decision of an intermediate appellate state court." 841 F.2d at 996. The Ninth Circuit, therefore, also follows relevant, non-final lower state court decisions under *West*.[14]

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[14] Various circuit court judges have stated that procedures other than the two outlined above should be followed. For example, Judge Magruder of the First Circuit expressed the view that a stay of federal proceedings might be appropriate until after a pending state supreme court proceeding resolved a critical issue of state law implicated in the federal proceeding. *See In re President and Fellows of Harvard College*, 149 F.2d 69, 72-73 (1st Cir. 1945); *see also Hamme*, 716 F.2d at 154-55 n.4; *Zimmerman v. Mathews Trucking Corp.*, 203 F.2d 864, 867-68 (8th Cir. 1953) ("*Zimmerman*"). There may be other decisions in which federal courts have suggested or granted stays in this situation, but we have found only a few published opinions on this issue.

Circuit courts also have questioned whether certification procedures, if available, must be used in any situation where a state's highest court has not yet ruled on the issue being considered by the federal court. *See, e.g., Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388 (7th Cir. 1992). The Delaware legislature recently has voted to amend the provisions of the Delaware Constitution regarding certification of questions of law to the Delaware Supreme Court. Effective January 28, 1993, the Supreme Court of the United

Thus, decisions of at least four other circuits conflict with the Third Circuit's decision in this case.

Moreover, an earlier decision of the Third Circuit demonstrates that there is a conflict even *within* the Third Circuit concerning whether a relevant, non-final lower state court decision must be considered, in the absence of a high court ruling. In *Hamme*, 716 F.2d at 154, the majority held that the lower state court decision should be followed. In that case, the three judges on the sharply divided panel each favored a different approach to whether deference should be accorded to a lower court decision that was the subject of a petition for *certiorari* to the Pennsylvania Supreme Court: (i) one judge believed that the lower court decision should be followed; (ii) another judge believed that the lower court decision should not be considered; and (iii) the third judge believed that the federal court should wait to rule until the state court decision was final.[15] Yet, in *New Castle VII*, the Third Circuit followed a different procedure—it ignored a non-final lower state court decision.

Thus, there is a conflict among the circuits, and even a conflict within the Third Circuit, concerning whether, under *West* and *Fidelity Union*, the federal courts must consider relevant, non-final lower state court decisions, in situations where the state's highest court has not spoken. The lack of guidance from this Court has resulted in circumstances, such as those in this case, in which a federal

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States, a federal court of appeals of the United States, or a United States district court may certify questions of law to the Delaware Supreme Court. Del. Const. of 1897, Art. IV § 11, *as amended* (1993). At the time *New Castle VII* was decided, Delaware did not permit circuit courts to certify questions of law to the state's highest court.

[15] In an analogous situation, the Eighth Circuit suggested, in *dicta*, that the parties should have made the federal trial court aware of a pending state court case which would be dispositive of the identical issue presented to that court: "The federal District Court should then have been requested to defer its ruling on the motion until the final determination of the [state court] case." *Zimmerman*, 203 F.2d at 868.

court decides to usurp the power of a state court by ignoring, and, therefore, effectively "reversing," a relevant, non-final lower state court decision, for federal but not state litigants. Guidance from this Court is necessary to create uniformity among the circuits, and within the Third Circuit, concerning the procedure to be followed by the federal judiciary when deciding matters of state law not ruled on by the state's highest court, where a relevant, non-final lower state court decision exists.

Petitioner believes that relevant, non-final lower state court decisions should be treated as cases controlled by *West* and its companion cases. Accordingly, this Court should vacate *New Castle VII*, because it is inconsistent with *West*.

CONCLUSION

This Court should provide guidance, and resolve the inter-circuit and intra-circuit conflicts, regarding the proper treatment by federal courts sitting in diversity of relevant, non-final decisions of lower state courts. Thus, the County respectfully requests that a writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the Third Circuit in *New Castle VII*.

Respectfully submitted,

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February 16, 1993

APPENDICES

APPENDIX A

Filed July 28, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3857

NEW CASTLE COUNTY

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation of the State of Connecticut, HOME INSURANCE COMPANY, a corporation of the State of New Hampshire, NEW HAMPSHIRE INSURANCE COMPANY, a corporation of the State of New Hampshire, CONTINENTAL CASUALTY COMPANY, a corporation of the State of Illinois, UNITED STATES FIRE INSURANCE COMPANY, a corporation of the State of New York, INSURANCE COMPANY OF NORTH AMERICA, a corporation of the State of Pennsylvania, CONTINENTAL INSURANCE COMPANY, a corporation of the State of New Hampshire, UNITED STATES LIABILITY INSURANCE CO., a corporation of the State of Pennsylvania, NATIONAL UNION FIRE INSURANCE COMPANY, a corporation of the Commonwealth of Pennsylvania, TWIN CITY FIRE INSURANCE COMPANY, a corporation of the State of Minnesota, AETNA CASUALTY AND SURETY COMPANY, a corporation of the State of Connecticut, and ZURICH INSURANCE COMPANY, A Swiss corporation,

CONTINENTAL CASUALTY COMPANY ("CNA"),
Appellant

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 85-00436)

Argued June 18, 1992

Before: GREENBERG and NYGAARD, *Circuit Judges*, and POLLAK, *District Judge**

(Opinion Filed July 28, 1992)

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* Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

This diversity case is a protracted insurance dispute which has spanned seven years and produced six published opinions. This one makes seven. Continental Casualty Company appeals from a declaratory judgment in favor of New Castle County declaring that under the comprehensive general liability insurance policy Continental has a duty to defend and indemnify New Castle for liability incurred when it discharged pollutants. The district court reasoned that because New Castle was unaware the substance it discharged was a contaminant, the pollution exclusion clause did not apply. The parties raise many issues and assignments of error. The sole issue is really whether the term "contaminants" in the pollution exclusion clause carries an implied scienter element. We hold that the term is plain and unambiguous under Delaware law and when a polluter discharges contaminants, whether or not he knows them to be contaminants, coverage is excluded under the insurance policy. We will reverse and remand with instructions to enter a judgment for Continental.

I.

We will recapitulate the facts and procedures only insofar as they are necessary to decide the narrow issue before us. For a complete factual recitation and proce-

dural history, see *New Castle County v Hartford Accident & Indem Co*, 933 F2d 1162, 1167-76 (3d Cir 1991) (*New Castle V*); *New Castle County v Hartford Accident & Indem Co*, 778 FSupp 812, 813-14 (D Del 1991) (*New Castle VI*).

New Castle had been insured by twelve insurance companies against liability for damages caused by discharging pollutants. The policies issued were post-1970, comprehensive general liability insurance policies and were standard throughout the insurance industry. Only two provisions of the policy need discussion, the "occurrence" and "pollution exclusion" clauses. The occurrence clause provides coverage for the insured for damages "caused by an occurrence." An occurrence is defined as an accident that during the policy period results in damage "neither expected nor intended" by the insured. The pollution exclusion clause, however, excludes coverage for damage arising out of the "discharge . . . of . . . contaminants"; but coverage is still provided if "such discharge . . . is sudden and accidental."

New Castle had incurred liability in three separate lawsuits, the gist of which being that New Castle poisoned the local drinking water when it discharged leachate from two landfills, Langollen and Tybouts Corner. New Castle filed this action against its twelve insurers and sought a declaration that they must defend and indemnify it. The insurers denied coverage. New Castle eventually settled with all the insurers except Continental.

The issue of whether Continental must defend and indemnify New Castle for damages caused by the Tybouts Corner operation was tried before the district court without a jury. The court upheld a previous ruling that the term "sudden and accidental" in the pollution exclusion clause was ambiguous under Delaware law and construed it to mean "unexpected." *New Castle III*, 725 FSupp at 813 (citing *New Castle County v Hartford Accident & Indem Co*, 673 FSupp 1359, 1364 (D Del 1987) (*New*

Castle I)). Since both the pollution exclusion and the occurrence clauses focus on the intent of the insured, the court conflated the two clauses into a single inquiry of whether New Castle expected pollution damage. Id. The district court found that New Castle did not expect off-site pollution to occur. It therefore held that an occurrence had taken place, that the pollution exclusion clause did not exclude coverage, and that Continental had a duty to defend and indemnify New Castle in the three underlying lawsuits. Id at 816. Continental appealed.

We upheld the determination that an occurrence took place and triggered the insurance coverage. *New Castle V*, 933 F2d at 1191-92. We also upheld the conclusion that the term "sudden and accidental" in the pollution exclusion clause was ambiguous and we construed it to mean "unexpected and unintended." Id at 1192-98. But we held that the district court erred when it considered the occurrence and pollution exclusion clauses coextensive. Id at 1162. We distinguished the occurrence clause, which focuses on *damage*, from the pollution exclusion clause, which focuses on *discharge*. The crux of this distinction is: The occurrence clause provides coverage when the damage was unexpected and unintended, though caused by an intentional act, whereas the pollution exclusion clause excludes coverage except when the discharge was unexpected and unintended. So an insured can point to unexpected and unintended damage as a result of a deliberate act of discharge, and therefore have an occurrence, yet still be excluded from coverage because the discharge was expected and intended.

We concluded that the damage/discharge distinction could prove dispositive because there is evidence that New Castle, while not expecting the Tybouts Corner landfill to produce off-site environmental damage, did expect the landfill to discharge leachate. Id at 1202. Because the district court treated the two clauses as coextensive, it never decided whether New Castle expected the discharge

of pollutants. We remanded to determine "whether the County expected the Tybouts Corner landfill to discharge leachate." Id.

The district court on remand found, and New Castle did not seriously dispute, that New Castle knowingly discharged leachate. But for the first time New Castle raised a distinction between "leachate" and "contaminant." *New Castle VI*, 778 FSupp at 817. New Castle asserted that while leachate, the substance it discharged, is widely known today to be a contaminant, it did not know this at the time of the discharge or contract formation.

The parties did not dispute the definition of leachate, an "aqueous liquid that contains soluble or suspended matter acquired as the water percolates through solid waste, soil, underlying mineral strata, or other materials." *New Castle V*, 933 F2d at 1167 n5; *New Castle III*, 725 FSupp at 803 n4. Nor did they contest that leachate *is* a contaminant; but they vigorously disputed the meaning of the term "contaminants." The district court agreed with New Castle and construed the pollution exclusion clause as excluding coverage only if the insured discharged a substance known to be a contaminant at the time of contract formation. *New Castle VI*, 778 FSupp at 820. It then found that New Castle was unaware leachate was a contaminant at that time and therefore the insurance policy still covered New Castle.

Continental appeals again, contending (1) that New Castle waived the "known contaminant" argument, (2) that we determined in *New Castle V* leachate fell within the meaning of the term "contaminants," (3) that the clause is unambiguous and neither distinguishes nor qualifies the term "contaminants," and (4) that even if New Castle's argument is accepted New Castle knew leachate was a contaminant at the time of contract formation.

In this appeal we will assume, without deciding, that New Castle did not waive the right to raise the "known contaminant" theory and that we did not determine that leachate fell within the meaning of the term "contaminants" in *New Castle V*.[1] The sole issue we need to address is whether the term "contaminants" in the pollution exclusion clause is plain and unambiguous, or whether it can be reasonably construed to contain a scienter element, that is, read so that the clause excludes coverage only if the insured discharges what is known to be a contaminant.

II.

Since the Delaware Supreme Court has yet to address this issue, we must predict how it would decide it. The correct construction of an insurance policy is a question of law, and we have plenary review. *New Castle V*, 933 F2d at 1183. See *Rohner v Niemann*, 380 A2d 549, 552 (Del 1977).

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[1] We question, however, why New Castle raises the "known contaminant" theory so late in this litigation. Everyone, including this court and the district court, presumed that since leachate is in fact a contaminant it fell within the term "contaminants." Even if this was an undetermined proposition, it was certainly a natural assumption. New Castle could have notified Continental and the district court in *New Castle I* that Continental has "failed" to establish an essential element of the pollution exclusion clause, the applicability of which the district court specifically analyzed. At the very latest, it could have raised the issue during the bench trial, which was memorialized in *New Castle III*. Yet it waited five years, when it was at the brink of losing, before bringing this issue. Had it done what it should, the issue would have been addressed in *New Castle V* and this appeal (*New Castle VII*) may have been unnecessary. While we choose not to decide the waiver issue, this kind of eleventh hour concoction undermines judicial economy as well as the responsible (or irresponsible) litigant's credibility with the court, irrespective of the rules of waiver that may or may not be applicable in these circumstances. Litigants are admonished to refrain from this kind of careless or dilatory practice. All issues that are contested should be brought before the court as early as possible.

When the language of an insurance policy is clear and unambiguous, Delaware applies ordinary principles of contract law. The parties are bound by the plain meaning of the policy, because manufacturing an ambiguity creates a new contract with rights, liabilities and duties to which the parties did not assent. *Hallowell v State Farm Mut Auto Ins Co*, 443 A2d 925, 926 (Del 1982). The court cannot contort the plain meaning of a policy term under the guise of construing it. *Apotas v Allstate Ins Co*, 246 A2d 923, 925 (Del 1968).

An ambiguity exists only when the language is subject to two or more reasonable interpretations. *Cheseront v Nationwide Mut Ins Co*, 402 A2d 1215, 1217 (Del Super 1979), aff'd 410 A2d 1015 (Del 1980). An ambiguity does not exist merely because two conflicting interpretations may be suggested; the insured must proffer more than a "*possible* construction of the policy." *Aetna v Casualty & Surety Co v Kenner*, 570 A2d 1172, 1174 (Del 1990) (emphasis in original). Because ambiguity lurks in every word, sentence, and paragraph in the eyes of a skilled advocate, absent a showing that the term has acquired a special meaning the question is not whether there is an ambiguity in the metaphysical sense, but whether the language has only one reasonable meaning when construed, not in a hypertechnical fashion, but in an ordinary, common sense manner. See *New Castle V*, 933 F2d at 1188; 2 Couch, Couch on Insurance 2d, § 15:17 at 177-78, 190 (Rhodes rev ed 1984).

We begin with the policy term in question. The pollution exclusion clause states in full:

> It is agreed that the insurance does not apply to bodily injury or property damage arising out of the *discharge*, dispersal, release or escape [collectively "discharge"] *of* smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, *contaminants* or pollutants

> [collectively "contaminants"] into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if *such discharge*, dispersal, release or escape *is sudden and accidental.*

(Emphasis added.)

Plainly, neither the dictionary definitions nor the popular usages of the substances named in the "contaminants" term require that we read a scienter element into them. But a word or a term cannot be considered in isolation; it must be read in the semantic and functional context of the policy or clause at issue to determine if two competing, reasonable interpretations exist. *See Cheseront*, 402 A2d at 1217.

The pollution exclusion clause analytically contains two parts: coverage is excluded if there is a "discharge . . . of . . . contaminants"; but it is reactivated if "such discharge" is sudden and accidental. We interpreted "sudden and accidental" to mean "unexpected and unintended." *New Castle V*, 933 F2d at 1192-98. This term imputes a scienter element. The issue is whether this scienter element modifies "discharge" only or whether it modifies "contaminants" as well.

Nowhere does the clause provide that coverage is reactivated if such "discharge, dispersal, release or escape *of contaminants* is [unexpected and unintended]." The clause instead provides: "but this exclusion does not apply if such *discharge*, dispersal, release or escape is [unexpected and unintended]." Under the plain terms of the clause, "unexpected and unintended" can only modify "discharge." The "known contaminant" theory is simply wrong. The insurance policy nowhere hints that the term "contaminants" carries with it a scientier element.

To accept New Castle's construction is also to accept the proposition that the policy excludes coverage for the insured only if it knowingly discharged known contaminants "into or upon land, the atmosphere or any *known*

watercourse or *known* body of water," for there is no principled method to include the scienter element in one term of the clause but exclude it in the other. We refuse to contort the pollution exclusion clause to require every element of the pollution exclusion clause to carry an implied scienter element because the drafter chose to write the policy in plain English rather than qualify every term ad infinitum. The construction of the policy language suggested by New Castle, while a *possible* interpretation, is not a reasonable one.

Any lingering vestige of semantic ambiguity may be dissipated when the term is taken in context with the function of the policy or clause so that the construction of the term has one reasonable meaning. See 2 Couch on Insurance, §§ 15:16, 15:26 at 166-76, 209-14. In *New Castle V* we explained the raison d'être of the pollution exclusion clause. We there gave the following example of two hypothetical cities to illustrate the economics underlying the allocation of risk by the clause: The first city was insured for all unexpected pollution damage, whereas the second city was insured only for damage that arises from unexpected discharge of pollutants. We reasoned that the first city has no incentive to improve landfill operations and therefore presents a moral hazard, whereas the second is given such an incentive. Sound reason thus explains why the insurance industry would accept and underwrite the risk in the latter but not the former.

The district court believed, and New Castle contends on appeal, that no incentive is created to minimize risk where the parties could not have reasonably foreseen that the substance dispersed from a site posed a danger, implying that the parties understood the scheme under the pollution exclusion clause to exclude coverage only in those circumstances where such incentive existed. *New Castle VI*, 778 FSupp at 820. That being so, the argument goes, our reasoning in *New Castle V* requires us to read a scienter element into the term "contaminants."

The district court misconstrued the hypothetical we gave in *New Castle V*. The example considered the problem in terms of incentives to illustrate how the parties allocated the risks. Its fundamental assumption was that the insured is always in the better position to cause or prevent the discharge of pollutants and therefore the pollution exclusion clause gives the insured an incentive "to take precautions designed to minimize the risk of environmental damages." *New Castle V*, 933 F2d at 1202. "Viewed through this economic prism," we said, "it would be eminently rational for an insurer to underwrite the risk of pollution damage posed by the second city, but not the risk posed by the first." Id. The clause thus embodies an understanding that the insurer will only underwrite a certain, specific risk, calculable to a margin of actuarial certainty and rational from an economic point of view for both parties. (Indeed the entire insurance industry revolves around this simple concept. See 1 Couch on Insurance 2d, §§ 1.2-1.5 at 4-11.)

The allocation of risk is understood when we consider who is in the best position to curtail, control or minimize certain risks. The purpose of the occurrence clause is, of course, to shift the risk of loss to the insured when it intentionally pollutes with the expectation of damages. The purpose of the pollution exclusion clause is specifically to shift the risk of loss to the insured when it intentionally discharges contaminants. Both kinds of risks are neither calculable to a margin of actuarial certainty nor economically sound for the insurer to underwrite.

The pollution exclusion clause, like the occurrence clause, places on the insured those certain risks whose contingencies are within the control of the insured, but when they are not, the risks fall on the insurer. Thus, the pollution exclusion and occurrence clauses read together provide insurance coverage only when the damage *and* the discharge were unexpected and unintended.

New Castle contends, however, that when it discharged leachate into the environment, it is still entitled to coverage under the policy since that discharge is no more inculpatory than spilling "holy water." Moral culpability is irrelevant in the economic scheme of things. Should the holy water later turn out to be a witches' brew, as it did here, New Castle bears the risk of damage from the innocent but intentional act of pollution as that risk has been allocated by the parties and embodied in the pollution exclusion clause. When the term "contaminants" is read in the ordinary, common sense fashion, considering it in the semantic and functional contexts of the pollution exclusion clause, it has only one reasonable interpretation: Knowledge of the nature of the substance discharged is irrelevant.

In *Independent Petrochemical Corp v. Aetna Casualty & Surety Co,* 781 FSupp 9 (DDC 1991), the insured contended that it did not know that the waste oil it discharged contained contaminants and therefore the pollution exclusion clause did not apply. Construing New York law, the district court rejected this argument and concluded the argument confuses the distinction between the occurrence and pollution exclusion clauses, turning the inquiry on its head from whether there had been a knowing discharge of contaminants into whether there had been a discharge of known contaminants, which inexorably goes to whether there has been an occurrence to trigger the policy coverage. Id at 17 (relying upon *Powers Chemco, Inc v Federal Insur Co,* 74 NY2d 910, 548 NE2d 1301, 549 NYS2d 650 (1989), and *Technicon Elec Corp v. American Home Assurance Co,* 74 NY2d 66, 542 NE2d 1048, 544 NYS2d 531 (1989)).

In *Northern Ins Co. v Aardvark Assoc, Inc,* 942 F2d 189 (3d Cir 1991), the insured contended that the pollution exclusion clause applied only to "active" polluters (that is, those who "actually release pollutants") and not "passive" ones. Noting that Pennsylvania law, like Delaware's, requires us to give effect to the plain and unam-

biguous terms of the insurance policy, we concluded that the pollution exclusion clause was clear:

> We have scrutinized this language for any hint that it is limited to "active" polluters or those who "actually release pollutants," but we find no ambiguity and no support for Aardvark's argument. The clause unambiguously withholds coverage for injury or damage "arising out of the discharge, dispersal, release or escape" of pollutants.

Id at 194 (emphasis in original). Thus we refused to inject a qualification into a term that is plain on its face.

The *Aardvark* and *Independent Petrochemical* decisions, while not decided under Delaware law, construed the same pollution exclusion clause under Pennsylvania and New York laws. Both laws are similar to Delaware's in that the language of an insurance policy is enforced according to its plain meaning.[2] See *Technicon*, 74 NY2d

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[2] Paradoxically, in *Aardvark* and *New Castle V* we construed the same "sudden and accidental" term of the pollution exclusion clause under Pennsylvania and Delaware plain meaning rules, and we arrived at different conclusions. In *New Castle V* we lacked guidance from the Delaware courts and predicted that the Delaware Supreme Court would conclude that the term "sudden and accidental" is ambiguous and would construe the policy to provide coverage if the discharge is simply "unexpected and unintended." A few months later, we held in *Aardvark* that while "accidental" connotes "unexpected and unintended," the word "sudden" imports an additional, temporal element, that being "abrupt" and lasting a short time. 942 F.2d at 193. This conclusion was predicated on decisions of the Pennsylvania Supreme Court, which reasoned that the term was " 'clear and plain, something only a lawyer's ingenuity could make ambiguous.' " Id at 192. Understandably, Aardvark relied on *New Castle V* to argue that coverage is reactivated if the discharge is unexpected and unintended regardless of whether it was short-lived. In rejecting this argument, we explained: "In *New Castle County*, without any specific guidance in Delaware case law, we predicted what the highest court of that state would do. Here, with strong guidance in decisions of the Superior Court of Pennsylvania, we feel constrained to reach a different conclusion." Id at 193. The paradox is thus more apparent than real.

at 76; *Standard Venetian Blind Co v American Empire Ins Co*, 503 Pa 300, 305, 469 A2d 563, 566 (1983). The *Independent Petrochemical* court rejected the precise argument New Castle raises. This court in *Aardvark* rejected an insured's attempt to inject an unspecified element into the pollution exclusion clause.

III

We hold that the term "contaminants" in the pollution exclusion clause is unambiguous and carries no implied scienter element. Since the district court has decided the issue for which we in *New Castle V* remanded, that is to say, New Castle expected the discharge of leachate, the well of issues in this case, as deep as it may have been, has finally run dry and this seven year insurance litigation ends. We will reverse and remand with instructions to enter judgment for Continental.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed August 4, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3857

NEW CASTLE COUNTY

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation of the State of Connecticut, HOME INSURANCE COMPANY, a corporation of the State of New Hampshire, NEW HAMPSHIRE INSURANCE COMPANY, a corporation of the State of New Hampshire, CONTINENTAL CASUALTY COMPANY, a corporation of the State of Illinois, UNITED STATES FIRE INSURANCE COMPANY, a corporation of the State of New York, INSURANCE COMPANY OF NORTH AMERICA, a corporation of the State of Pennsylvania, CONTINENTAL INSURANCE COMPANY, a corporation of the State of New Hampshire, UNITED STATES LIABILITY INSURANCE CO., a corporation of the State of Pennsylvania, NATIONAL UNION FIRE INSURANCE COMPANY, a corporation of the Commonwealth of Pennsylvania, TWIN CITY FIRE INSURANCE COMPANY, a corporation of the State of Minnesota, AETNA CASUALTY AND SURETY COMPANY, a corporation of the State of Connecticut, and ZURICH INSURANCE COMPANY, A Swiss corporation,

CONTINENTAL CASUALTY COMPANY ("CNA"),
Appellant

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action No. 85-00436)

Argued June 18, 1992

Before: GREENBERG and NYGAARD, *Circuit Judges*, and POLLAK, *District Judge**

(Opinion Filed July 28, 1992)

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* Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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ORDER AMENDING OPINION

IT IS ORDERED that the opinion in the above case, filed on July 28, 1992, be amended to include the Amicus-Appellant and the Amicus-Appellees and their attorneys in the caption.

BY THE COURT

/s/ Richard L. Nygaard
Circuit Judge

Dated: August 4, 1992

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 85-436-JLL

NEW CASTLE COUNTY,
Plaintiff,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation; HOME INSURANCE COMPANY, a New Hampshire corporation; NEW HAMPSHIRE INSURANCE COMPANY, a New Hampshire corporation; CONTINENTAL CASUALTY COMPANY, an Illinois corporation; UNITED STATES FIRE INSURANCE COMPANY, a New York corporation; INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation; CONTINENTAL INSURANCE COMPANY, a New Hampshire corporation; UNITED STATES LIABILITY INSURANCE COMPANY, a Pennsylvania corporation; NATIONAL UNION FIRE INSURANCE COMPANY, a Pennsylvania corporation; TWIN CITY FIRE INSURANCE COMPANY, a Minnesota corporation; AETNA CASUALTY AND SURETY COMPANY, a Connecticut corporation; and ZURICH INSURANCE COMPANY, a Swiss corporation,
Defendants.

George H. Seitz of Prickett, Jones, Elliot, Kristol & Schnee, Wilmington, Del., and Joseph D. Tydings, Jerold Oshinsky, and Catherine J. Serafin Sponseller of Anderson, Kill, Olick & Oshinsky, Washington, D.C., of counsel, for plaintiff New Castle County.

John G. Mulford and Michael J. Goodrick of Theisen, Lank, Mulford & Goldberg, Wilmington, Del., and Arthur Makadon, David L. Cohen, Geoffrey A. Kahn, Walter Einhorn, Jr., and Gilpin w. Bartels of Ballard, Spahr, Andrews & Ingersoll, Philadelphia, Pa., of counsel, for defendant Continental Casualty Company.

Clifford B. Hendler, John I. Stewart, Jr., Scott L. Winkelman, and William D. Wallace of Crowell & Moring, Washington, D.C., and Dennis M. Flannery and A. Stephen Hut, Jr. of Wilmer, Cutler & Pickering, Washington, D.C., of counsel, for defendant Insurance Co. of North America.

William J. Cattie III of Heckler & Cattie, Wilmington, Del., and Edward B. Deutsch, Laurence M. McHeffey and Loren L. Pierce of McElroy, Deutsch & Mulvaney, Morristown, N.J., of counsel, for defendant U.S. Fire Insurance Company.

Gary W. Aber of Heiman, Aber & Goldlust, Wilmington, Del., and James E. Rocap III, Thomas B. Carr and D. Bradley Clements of Miller, Cassidy, Larroca & Lewin, Washington, D.C. of counsel, for defendant Aetna Casualty & Surety Company.

Dennis D. Ferri and Michael A. Pedicone of Dennis D. Ferri, P.A., Wilmington, Del., and Philip A. Ryan of German, Gallagher & Murtagh, Philadelphia, Pa., of counsel, for defendant U.S. Liability Insurance Company.

Norman M. Monhait of Rosenthal, Monhait & Gross, Wilmington, Del., and Roger E. Warin, Virginia L. White-Mahaffey, Anita G. Raby and Janet W. Steverson-Wright of Steptoe & Johnson, Washington, D.C., of counsel, for defendant The Home Insurance Company.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Wilmington, Delaware
October 31, 1991.

LATCHUM, Senior District Judge.

I. NATURE OF THE ACTION

New Castle County (the "County") originally filed this action against twelve insurance companies which had issued insurance policies to the County. The County sought a declaration that the insurance companies must defend and indemnify the County. The County had incurred liability as a result of pollution from two landfills, Langollen and Tybouts Corner. All of the insurers denied coverage and asserted affirmative defenses, and some of the insurers filed cross-claims against each other. The County settled with eleven of the insurers before trial, leaving only Continental Casualty Company ("CNA") to defend the policy implicated here.[1] *New Castle v. Continental Casualty Co.*, 725 F. Supp. 800, 802-03 (D. Del. 1989) (*"New Castle III"*), *rev'd sub. nom. New Castle County v. Hartford Accident and Indem. Co.*, 933 F.2d 1162 (3d Cir. 1901) (*"New Castle V"*).

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[1] The eleven insurance companies that have settled are the following: U.S. Fire Insurance Company, U.S. Liability Insurance Company, Aetna Casualty & Surety Company, Hartford Accident & Indemnity Company, Twin City Fire Insurance Company, Home Insurance Company, Insurance Company of North America, National Union Fire Insurance Company, Continental Insurance Company, Zurich Insurance Company, and New Hampshire Insurance Company.

The parties in this case have already come before this Court several times and now appear on remand. *See New Castle County v. Hartford Accident & Indemnity Co.*, 673 F. Supp. 1359 (D. Del. 1987) (*"New Castle I"*); *New Castle County v. Hartford Accident & Indemnity Co.*, 685 F. Supp. 1321 (D. Del. 1988) (*"New Castle II"*); *New Castle III; New Castle County v. Continental Casualty Co.*, 728 F. Supp. 324 (D. Del. 1989) (*"New Castle IV"*). In *New Castle I* the Court denied the insurers' motion concerning the scope of the pollution exclusion clauses and the term "damages" under the policies. The Court held that "sudden" discharge or dispersal in the pollution exclusion clause constitutes an "unexpected" discharge or dispersal. *See* 673 F. Supp. at 1364. The Court also held that the term "damages" encompassed liability. *See id.* at 1365-66. Both of these holdings have been upheld on appeal. *See New Castle V*, 933 F.2d at 1184-91, 1193-99. In *New Castle II* the Court granted CNA's motion for summary judgment with regard to claims regarding the Llangollen landfill and denied the motion with regard to the "notice" and "occurrence" issues. *See* 685 F. Supp. 1321.

After a trial without a jury on June 5-8, and 12-14, 1989, this Court made its findings of fact and conclusions of law in *New Castle III*. In determining whether CNA was obligated to afford primary coverage to the County, the Court looked to four criteria distilled from the policy's provisions of coverage and its definition of occurrence. The Court held (1) the beginning of the injurious process of property damage triggered CNA's primary policies; (2) the pollution exclusion clause [2] and the occurrence

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[2] The pollution exclusion clause bars insurance coverage for

> bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this

clause [3] were co-extensive, only "expected" pollution damage would therefore fall outside of the policy under either clause, and there was neither a "substantial probability" nor an "expectation" of off-site pollution with regard to the Tybouts County Landfill; (3) the Owned Property Exclusion in the policy did not apply; and (4) there was no basis for the proration of losses among all the policies triggered. *New Castle III*, 725 F. Supp. at 809-17. The Court also decided issues not relevant to primary coverage, which is at issue here.[4] The Court denied CNA's motion for reargument.

CNA then filed cross-claims against other insurers that had previously settled with the County and sought a judgment under Rule 54(b) that would allow these cross-claims.[5] This Court held that a stipulation between the

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> exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

New Castle I, 673 F. Supp. at 1362 n.4.

[3] An "occurrence" triggers CNA's duty to pay damages. The parties agree that an "occurrence" is

> an accident, including injurious exposure to condition, which results, during the policy period, in bodily injury or property damage, neither expected nor intended from the stand-point of the insured.

New Castle V, 933 F.2d at 1180-81; *see also New Castle III*, 725 F. Supp. at 807 & n.8; *New Castle II*, 685 F. Supp. at 1329; *New Castle I*, 673 F. Supp. at 1363 n.5.

[4] Specifically, the Court held (1) with regard to excess coverage, one policy had been triggered, while a second was prematurely brought with respect to the duty to indemnify; (2) no mitigation clauses applied to excess coverage; (3) CNA had a duty to cover the County's defense of three suits; and (4) the County's request for attorney's fees was not warranted. *New Castle III*, 725 F. Supp. at 817-20.

[5] The cross-claims were filed against Insurance Company of North America, U.S. Fire Insurance Company, Aetna Casualty & Surety Company, Home Insurance Company, and U.S. Liability Insurance Company. *New Castle IV*, 728 F. Supp. at 326.

insurance companies barred the cross-claims at issue. *New Castle IV*, 729 F. Supp. 324. On appeal, the Third Circuit reversed, finding that the cross-claims were filed in a timely manner, and refused to decide whether the settlements between the County and the other insurance companies barred the cross-claims. *New Castle V*, 933 F.2d at 1203-06.

With regard to the insurance policy's coverage, the Third Circuit upheld the decision in all respects but one: the occurrence clause and the pollution exclusion clause should not be considered co-extensive. *See New Castle V*, 933 F.2d 1162. The Court now takes up the case on remand, setting forth its findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

II. THE LAW OF THE CASE AND THE ISSUE BEFORE THE COURT

The first question before the Court is precisely what it is required to decide on remand. First, it is clear that the Third Circuit decided that the pollution exclusion clause and the occurrence clause should not be considered co-extensive. According to the Third Circuit, this Court's reliance on the fact that "the phrases 'neither expected nor intended' and 'sudden and accidental' are roughly synonymous . . . was reversible error." *Id.* at 1203. The Third Circuit discusses the issue under the subheading "The Damage/Discharge Distinction," and the analysis focuses on this issue. *Id.* at 1199-1203.

Second, as a consequence of its analysis of the damage/discharge distinction, the Third Circuit remanded the case for this Court to determine if the discharge would be excluded from coverage under the pollution exclusion clause. In its final conclusion, the Third Circuit asked the Court to address the following question:

> [t]he district court on remand should determine whether the County expected Tybouts Corner landfill

> to discharge or release contaminants into or upon the land, or any watercourse or body of water.

Id. at 1207. Answering Brief of New Castle County, Docket Item "D.I." 576 at 3. In its opinion, however, the Third Circuit has used the term "leachate" interchangeably with the terms "contaminants" and "pollutants." *See id.* at 1202-03. Where the term "leachate" was used, the Third Circuit stated that this Court should determine whether the County expected the Tybouts Corner landfill to discharge or release leachate. *Id.* The opinion uses the same language as in its conclusion, with the exception of the term "leachate." The Court assumes from the opinion that the Third Circuit presumed leachate to be a contaminant or pollutant within the meaning of the pollution exclusion clause. In its Reply Brief, CNA contends that these statements establish the mandate of the Third Circuit and the law of the case. Reply Brief of CNA, D.I. 578 at 4-5. If this Court accepts it as such, this Court would be bound to follow it. *See Delgrosso v. Spang & Co.*, 903 F.2d 234, 240 (3d Cir.), *cert. denied*, 111 S.Ct. 428 (1990).

The Court finds that the Third Circuit's occasional equation of leachate with pollutants or contaminants constitutes a presumption of fact not binding on this Court rather than part of the mandate or the law of the case. While the Court must adhere to the clear mandate of a superior court, the Court must also avoid implementing the mandate so as to exceed its scope. *Texas Oil & Gas Corp. v. Hodel*, 654 F. Supp. 319, 323 (D.D.C. 1987). The Third Circuit has held that a district court "may consider as a matter of first impression, those issues not expressly or implicitly disposed of by the appellate decision." *Delgrosso*, 903 F.2d at 240 (citation and punctuation omitted); *see also Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979).

The most obvious way to formulate the issue is in terms of whether the County expected to discharge or release

contaminants. In its conclusion, the Third Circuit used the word "contaminants," and both parties have initially accepted this formulation as the issue. Opening Brief of CNA, D.I. 573 at 1; Answering Brief of New Castle County, D.I. 576 at 3. This formulation also tracks the language of the pollution exclusion clause, which is the logical way to formulate the issue once the Third Circuit has separated the occurrence clause and the damage clause.

The words and the structure of *New Castle V* also indicate that little weight should be given to the linguistic equation of "leachate" with "pollutants" or "contaminants." Where the Third Circuit did use the term "leachate," it did so without any legal or factual explanation in an opinion that, in other respects, explained its conclusions at great length. The use of the term actually occurs while the Third Circuit explicitly discussed *another* issue—the damage/dispersal distinction. *New Castle V*, 933 F.2d at 1109-1203. In adopting this Court's definition of leachate, the Third Circuit also demonstrated that it did not consciously define the term so that it must be considered a pollutant or contaminant.[6] Today leachate is commonly understood to be a pollutant, so the equation of terms is understandable where the issue is not squarely presented for determination. This Court cannot read into the mere use of the term "leachate" in the discussion of another issue the conclusion that the Third Circuit explicitly determined that leachate constitutes a "pollutant" or "contaminant" under the contract. *Cf. Delgrosso*, 933 F.2d at 240 ("Our reference to the Lorain plant at the beginning of the opinion was not intended as a definition

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[6] "Leachate" has been defined as "[a]n aqueous liquid that contains soluble or suspended matter acquired as the water percolates through solid waste, soil, underlying mineral strata, or other materials." *New Castle V*, 933 F.2d at 1167 n.5; *New Castle III*, 726 F. Supp. at 803 n.4 (quoting 2 *International Dictionary of Medicine and Biology* 1533 (1986)).

of the Fund [which one party asserts narrowed the issue on remand]—but rather as a description of the participants who had initiated the suit.").

Nor can the Court conclude that *New Castle V* implicitly decided the question. A question is implicitly disposed of where it was necessarily implied in the claim before the appellate court or if the failure to raise the question constitutes implied waiver. *Koyats v. Rutgers*, 633 F. Supp. 1469, 1472 (D.N.J. 1986). The determination of the status of leachate was not necessary to reverse this Court's determination that the occurrence clause and the pollution exclusion clause are co-extensive. Rather, the issue arises as a consequence of the Third Circuit's holding that the occurrence clause and the pollution clause must be considered separately.

CNA argues that, because the County did not argue that leachate does not constitute a pollutant or a contaminant under the contract on appeal, it has waived its ability to make this argument. Consequently, the Court could not consider the issue on remand. Indeed, there is authority stating that it is improper to raise new defenses that had not been discussed earlier. *See New York City Unemployed & Welfare Council v. Brezenoff*, 742 F.2d 718, 724 n.3 (2d Cir. 1984). This principle, however, applies to defenses or arguments that are separate from the establishment of the elements of the other party's prima facie case. *See, e.g., id.* (government barred from asserting additional interest to justify speech ban on remand). Here, the question of whether "leachate" can be considered a "pollutant" or "contaminant" under the contract is part of CNA's argument that coverage is excluded under the pollution exclusion clause. *See New Castle V*, 933 F.2d at 118 (CNA has burden of proving application of pollution exclusion clause). The issue involves this Court's examination of the facts at trial to determine whether CNA has proven the application of the pollution exclusion clause, not a separate legal argument

on the part of the County.[7] On remand, this Court stands in the position to determine the merits of CNA's argument on the existing factual record. *See Delgrosso*, 903 F.2d at 240.

III. FINDINGS OF FACT

Previous discussions of the facts in this case appear in *New Castle IV*, 933 F.2d at 1169-76; *New Castle III*, 725 F. Supp. at 803-09; *New Castle II*; 685 F. Supp. at 1324-26; *New Castle I*, 673 F. Supp. at 1361-62 . The Court relies on *New Castle III* for its version of the facts, since the Court found these facts after a full trial. The Third Circuit relied on these findings of fact in its own discussion. *New Castle V*, 933 F.2d at 1169. The Court finds that the facts as described in *New Castle III*, 725 F. Supp. at 803-09, are sufficient to decide this issue.

A. *The County Expected the Discharge of Leachate from the Tybouts Corner Landfill Into or Upon the Land or Any Watercourse or Body of Water.*

The issue before the Court is a factual question "whether the County expected Tybouts Corner landfill to discharge or release contaminants into or upon the land or any watercourse or body of water." *New Castle V*, 933 F.2d at 1207.

The issue presents several questions. First, was there a "discharge or release" of a substance at Tybouts Corner? Second, was this discharge or release "into or upon

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[7] A consideration of the mandate of the Third Circuit confirms this view. In addressing the resolution of the question under the pollution exclusion clause, the Third Circuit specifically stated that it did not know what the County would argue in response to its reading of the facts. The County could have argued that it did not intend or expect any discharge of leachate on the previous appeal. Yet CNA does not argue that it has waived this argument, for the mandate of the Third Circuit specifically allowed such a new argument on remand.

the land or any watercourse or body of water?" Third, did the county "expect" the discharge or release of the substance? Finally, should the substance be labelled a "contaminant[]" under the meaning of the contract? Most of these questions have an apparent answer. In *New Castle III*, this Court found that, when leachate was found in areas around the site, "the landfill was functioning as expected." 725 F. Supp. at 815. The entire design of the landfill reflected an understanding that leachate would filter through the soil into the surrounding land and water. This design can be explained by the fact that it reflected the most sophisticated knowledge of the time. Other evidence suggests that the discharge of leachate was not unexpected. *See New Castle V*, 933 F.2d at 1202-03. The Court need not belabor the point, and the County does not seriously dispute it. The County expected the discharge or release of a substance into or upon the land or any watercourse or body of water. The remaining question is whether leachate constituted a contaminant under the contract.

B. *The Parties Did Not Understand the Leachate Dispersed from the Tybouts Corner Landfill To Be a Harmful or Toxic Substance at the Time of the Contract.*

Another question that remains is what the parties understood about the leachate from the Tybouts Corner landfill at the time of the insurance policy. CNA argues that there was knowledge at that time that wastes from the landfill should not come into direct contact with the water table and therefore that leachate from landfills was thought to be a pollutant. In support of this position, CNA points to the publication *Sanitary Landfill Facts*. The publication, which represented the state of the art at the time, devoted one paragraph to water pollution. The possibility arises, according to the publication, under certain geological conditions if solid waste is brought in direct contact with groundwater. CNA Appendix

("App.), D.I. 574 at A000043. Testimony at the trial confirms the fact that officials had an idea that waste should be kept above the seasonal high water mark. *See New Castle III*, 725 F. Supp. at 804.

Our findings of fact in *New Castle III* show that there was no understanding of the environmental hazards from the drainage of leachate on the part of either landfill operators or the insurance companies in 1968.[8] *Id.* at 804. No scientific studies of the problem existed in the eastern United States at the time; no mathematical models of leachate creation or migration existed; no technology for leachate control had been developed; knowledge of leachate formation was not widespread; and regulations in 1969 did not address leachate. *Id.* at 803-04. At the time the primary concern was direct-contact problems, such as rodents, litter, odors, etc. *Id.* at 804.

Although direct contact between municipal waste and water was an acknowledged potential danger at that time, professionals believed that drainage from landfills did not pose such a danger. In the publication that CNA cites, *Sanitary Landfill Facts*, drainage is not discussed in the context of water pollution. CNA App., D.I. 574 at A000043. Drainage is deemed important because it "will prevent runoff water from eroding the cover material and exposing the wastes." CNA App., D.I. 574 at A000042. The belief at the time was that landfills purified themselves through a process of soil filtration. *New Castle III*, 725 F. Supp. at 804. Because of this process of soil filtration, professionals believed that this type of leachate, to the extent they were aware of the term, was not a pollutant. Although this distinction appears to be faulty

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[8] In *New Castle III* this Court found that the policy was triggered at the beginning of the alleged property damage, which started as early as the first half of 1969. 725 F. Supp. at 809-13. The trigger for the policy coverage is too close to the signing of the contract to suppose that the parties understood the contract differently.

in light of today's knowledge, it reflects the lack of knowledge about leachate at the time.[9]

The events that occurred at the landfill itself also do not lead to a conclusion that the operators of the Tybouts Corner landfill knew about the potential danger of the leachate. CNA alludes to events that occurred after the signing of the policy in 1968 and the trigger for coverage in early 1969; these events do not alter the parties' original understanding of the terms of the contract. The only event that occurred near this time frame, the University of Delaware reports, actually concluded that there was every reason to believe that pollutants were *not* being dispersed from the site. *New Castle III*, 725 F. Supp. at 815.

IV. CONCLUSIONS OF LAW

A. *The Court Must Consider Whether the Leachate From the Tybouts Corner Landfill Was Understood To Be a Contaminant.*

The issue presented on remand is whether the County expected the discharge or release of contaminants into or upon the land, or any watercourse or body of water. In interpreting the meaning of the words used in this formulation of the issue, the Court must consider the fact that the question is derived from a contract between the

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[9] The definition of leachate adopted by this Court and the Third Circuit demonstrates that leachate need not carry pollutants, only "soluble or suspended matter." *New Castle III*, 725 F. Supp. at 803 n.4; *New Castle V*, 933 F.2d at 1167 n.5. Under this definition an aqueous solution carrying innocuous mineral particles may constitute leachate. Just as the Court could not equate such a clearly innocuous substance with the leachate dispersed from the Tybouts Corner landfill, the Court cannot equate the leachate dispersed at Llangollen with the leachate dispersed at Tybouts Corner. The discharges at Llangollen landfill involved different circumstances and played a part in establishing theories of leachate production and migration in Delaware. *New Castle III*, 725 F. Supp. at 815-16. They are not relevant for the purposes of this decision.

two parties. This contract excluded coverage for the following:

> bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

New Castle V, 673 F. Supp. at 1362 n.4. Thus, if the County did "expect[] Tybouts Corner landfill to discharge or release contaminants into or upon the land or any watercourse or body of water" as these terms are used under the contract, coverage would be excluded.[10]

Several factors suggest the necessity of addressing the question of whether leachate should be considered a contaminant under the contract. The Third Circuit used the term in forming its question for remand. In addition, the pollutant exclusion clause excludes coverage for damage arising from the discharge of "smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials *or other* irritants, contaminants or pollutants." The wording of the clause shows that the substance released must constitute an irritant, contaminant, or pollutant to give rise to the exclusion, and each term of the contract should be given meaning in its interpretation.

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[10] The Court will use the term "contaminant" rather than "irritant[], contaminant[], or pollutant[]", which is used in the contract. For the purposes of this case, all of the terms may be defined as "a toxic or particularly harmful material which is recognized as such in industry or by government regulators." *Westchester Fire Ins. Co. v. City of Pittsburgh, Kansas*, No. 90-2305-0, slip op. at 2 (D. Kan. June 25, 1991). In the Court's judgment, no distinction between the terms would alter the result in the case. Furthermore, the use of the term "contaminant" follows the language that the Third Circuit used in formulating the mandate to this Court.

Weber v. IMT Ins. Co., 462 N.W.2d 283, 286 (Iowa 1990). Without this limitation, the clause would go far beyond the purpose of the exclusion, which is to place the risk and thus the incentive to take precautions upon the insured when releasing dangerous substances. *See New Castle V*, 933 F.2d at 1202. If a substance is not recognized in industry or by governmental regulators as a potentially toxic or harmful to the environment, no incentive is provided by placing the risk upon the insured. In addition, numerous other courts have refused to equate the release of contaminants with the release of other substances. *See, e.g., Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 So.2d 95, 100 (Ala. 1977) (sand and mud); *U.S. Fidelity & Guar. Co. v. Armstrong*, Jud. Council Coord. Proc. Case No. 1072, slip op. at 18-19, Decision on Phase IV Issues (Cal. Super. Aug. 29, 1988) (asbestos); *A-1 Sandblasting & Steamcleaning Co. v. Baiden*, 632 P.2d 1377, 1379 (Or. App. 1981), *aff'd*, 643 P.2d 1260 (Or. 1982) (paint).

The focus on this issue does not merely restate the occurrence clause, as CNA contends. One may knowingly discharge a pollutant without the expectation of environmental damage. In order for the substance to be a pollutant, a person need only know the substance dispersed has a realistic *potential* for environmental damage. *See, e.g., Town of Tieton v. General Ins. Co. of North America*, 61 Wash. 2d 716, 722 (1963) (the insured "took a calculated business risk" that no damage would occur). The fact that a substance actually causes damage does not make it a contaminant; the substance must be "a toxic or particularly harmful material which is recognized as such in industry or by governmental regulations." *Westchester Fire Ins. Co. v. City of Pittsburgh, Kansas*, No. 90-2305-0, slip. op. at 2 (D. Kan. June 25, 1991). The question is whether the leachate from the Tybouts Corner landfill can be considered such a substance.

B. *The Parties' Understanding of the Term "Contaminant" Is Determined By What Was Recognized To Be a Contaminant at the Time the Contract Was Made.*

The burden is on the insurance company seeking to deny coverage to show that the substance in question was a contaminant. *In re Hub Recycling, Inc.*, 106 B.R. 372, 375 (Bankr. D.N.J. 1989). The County argued that because leachate was not recognized as a contaminant at the time the contract was made, the parties did not and should not have considered the leachate to be a contaminant under the contract. CNA argues that there is no requirement that leachate was a known contaminant; the condition of the clause is satisfied if the leachate can now be regarded as a pollutant. Knowledge, they argue, adds an element that is not expressed in the clause. *See United States Fid. & Guar. Co. v. Murray Ohio Mfg. Co.*, 693 F. Supp. 617, 622 (M.D. Tenn. 1988), *aff'd*, 875 F.2d 868 (6th Cir. 1989) (motive for dispersing pollutants not relevant under the clause). CNA then recites instances where, with the benefit of hindsight, this Court and various witnesses describe the potential dangers of the leachate from the Tybouts Corner Landfill. *See, e.g., New Castle III*, 725 F. Supp at 814 ("CNA offered unrefuted evidence . . . that leachate would have eventually caused property damage even had all chemical waste been turned away from the site.").

More precisely, the question is not the addition of an element of motive or knowledge, but the meaning of the terms under the contract. The interpretation of contracts is not based on an objective interpretation, but "with the meanings attached by each party *at the time the contract was made.*" E. Allan Farnsworth, 2 *Farnsworth on Contracts* 244 (1990) (emphasis added). Insurance contracts are interpreted under the same principle. *See Calcasieu-Marine National Bank v. American Employers' Ins.*, 533 F.2d 290, 295 (5th Cir. 1976), *cert. denied*, 429 U.S. 922 (1981).

The Court concludes that the parties' understanding of the term "contaminant" is determined by what was recognized as a contaminant at the time the contract was made. One might contend that in 1968 the County assumed the risk that a substance might be discovered to be a pollutant, but such a reading is not compelling. First, since the risk that a certain substance will later be discovered to be a pollutant is not reasonably foreseeable, it is not the kind of risk that is normally understood to be placed on the insured. *See* Robert D. Chesler, Michael L. Rodburg, and Cornelius C. Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 Rutgers L.J. 9, 14 (1986) ("[C]ourts have primarily sought to determine whether or not the resulting damage was actually expected or intended by the insured or was so readily foreseeable as to reflect a business risk assumed by the insured."). Second, if there are two reasonable readings, the term is ambiguous and will be construed to the benefit of the insured and against the insurer that drafted the policy. *Aetna Casualty and Surety Co. v. Kenner*, 570 A.2d 1172, 1174 (Del. 1990).

This reading is also consistent with the purpose of the clause. The Third Circuit found that pollution exclusion clause provides "a strong incentive to take precautions designed to minimize the risk of environmental damage." *New Castle V*, 933 F.2d at 1202. The clause creates this incentive by denying coverage to "those who knew or should have known their action would cause harm." *Grinnell Mut. Reins. Co. v. Wasmuth*, 432 N.W.2d 495, 498 (Minn. Ct. App. 1988). No incentive is provided to minimize risk where the parties could not have known that the substance dispersed from a site posed a danger. This fact is illustrated by this case, for here the County used the most sophisticated technology and expertise available at the time and still believed that the drainage of leachate did not pose a danger. What remains is the

principle of the primary policy, which gives coverage for unexpected and unintended losses.

V. CONCLUSION

Based on the credible evidence adduced at trial, the Court finds that CNA has not overcome its burden of proving by a preponderance of the evidence that the County expected to discharge or release contaminants into or upon the land or any watercourse or body of water. The County is therefore entitled to a declaratory judgment that the pollution exclusion (exclusion f) does not apply to the sums that the County becomes obligated to pay arising from (1) *United States v. New Castle County*, Civil Action No. 80-489, (2) *Andrews v. New Castle County*, Civil Action No. 84-124, and (3) *Wagner v. New Castle County*, Civil Action 7008.

For the foregoing reasons, an appropriate Order will be entered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 85-436-JLL

NEW CASTLE COUNTY,

Plaintiff,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation; HOME INSURANCE COMPANY, a New Hampshire corporation; NEW HAMPSHIRE INSURANCE COMPANY, a New Hampshire corporation; CONTINENTAL CASUALTY COMPANY, an Illinois corporation; UNITED STATES FIRE INSURANCE COMPANY, a New York corporation; INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation; CONTINENTAL INSURANCE COMPANY, a New Hampshire corporation; UNITED STATES LIABILITY INSURANCE COMPANY, a Pennsylvania corporation; NATIONAL UNION FIRE INSURANCE COMPANY, a Pennsylvania corporation; TWIN CITY FIRE INSURANCE COMPANY, a Minnesota corporation; AETNA CASUALTY AND SURETY COMPANY, a Connecticut corporation; and ZURICH INSURANCE COMPANY, a Swiss corporation,

Defendants.

FINAL JUDGMENT AND ORDER

The Court concluding that Judgment should be entered in accordance with the Findings of Fact and Conclusions of Law filed heretofore, it is

ORDERED, ADJUDGED AND DECREED that a declaratory judgment be and is hereby entered in plaintiff New Castle County's favor and against defendant Continental Casualty Company, declaring that the pollu-

tion exclusion (exclusion f) does not apply to sums plaintiff New Castle County is or becomes legally obligated to pay arising from (1) *United States v. New Castle County*, Civil Action No. 80-489, (2) *Andrews v. New Castle County*, Civil Action No. 84-124, and (3) *Wagner v. New Castle County*, Civil Action 7008.

Dated: October 31, 1991.

/s/ James L. Latchum
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 85-436-JLL

NEW CASTLE COUNTY,

Plaintiff,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut corporation; HOME INSURANCE COMPANY, a New Hampshire corporation; NEW HAMPSHIRE INSURANCE COMPANY, a New Hampshire corporation; CONTINENTAL CASUALTY COMPANY, an Illinois corporation; UNITED STATES FIRE INSURANCE COMPANY, a New York corporation; INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation; CONTINENTAL INSURANCE COMPANY, a New Hampshire corporation; UNITED STATES LIABILITY INSURANCE COMPANY, a Pennsylvania corporation; NATIONAL UNION FIRE INSURANCE COMPANY, a Pennsylvania corporation; TWIN CITY FIRE INSURANCE COMPANY, a Minnesota corporation; AETNA CASUALTY AND SURETY COMPANY, a Connecticut corporation; and ZURICH INSURANCE COMPANY, a Swiss corporation,

Defendants.

ORDER AMENDING OPINION

The slip opinion filed October 31, 1991, in the above captioned case (Docket Item ["D.I."] 584) is amended as follows:

1. On page 12, the sentence carried over from page 11 is amended by *deleting* "in 1968." *and substituting* "at the time of the landfill's construction."

2. On page 12, the text of note 8 is amended by *deleting it in its entirety and substituting* the following:

> 8. The credible factual record provides no reason to conclude that the parties' understanding about the dangers of leachate dispersion from Tybouts Corner changed significantly during the time the landfill was operating and up to the time CNA's policies were issued because of changes in general knowledge about leachate that were recognized by government agencies, by the insurance industry, or by landfill experts.

3. On page 13, the paragraph beginning on line 3 is amended by *deleting it in its entirety and substituting* the following:

> The events that occurred at the landfill itself also do not lead to a conclusion that the operators of the Tybouts Corner landfill knew about the potential danger of the leachate. CNA alludes to events that they claim show knowledge that the leachate from Tybouts Corner posed great danger. This Court's previous findings of the most serious of these events, the University of Delaware reports, the black pond incident, and the Winterim report, indicate that the events did not demonstrate to the operators of the landfill that the leachate dispersed from Tybouts Corner was a substance that posed a realistic threat to the surrounding environment. *Id.* at 815-16. This Court examined the events from 1968 to 1975. *Cf. id.* at 814 ("CNA has not shown that it was *expected* in the period from 1968 to 1975 that chemical waste would exacerbate a leachate problem. In fact, the evidence indicates the contrary.") None of the events during that time, which extended to the time the policies were issued, demonstrate that the parties understood the leachate dispersed from Tybouts Corner to pose a serious risk of contamination to the surrounding environment. Reports confirmed that "the

landfill was behaving in a manner consistent with its design." *Id.* at 816. The University of Delaware reports, for instance, actually concluded that there was every reason to believe that pollutants were *not* being dispersed from the site. *Id.*

4. On page 16, the second sentence of Section B is amended by *deleting* the entire sentence *and substituting* the following sentence:

> The County argued that because leachate was not recognized as a contaminant, it should not be considered a contaminant under the contract.

5. On page 17, 2d full paragraph, line 3 is amended by *deleting* "contract was made" *and substituting* "policies were issued in the early 1970s".

6. On page 17, 2d full paragraph, line 4 is amended by *deleting* "in 1968".

Dated: November 21, 1991.

/s/ James L. Latchum
United States District Judge

Copies mailed and/or delivered this date to:
J.R. McAllister, Jr., Clerk
(see Attached List of Attorneys)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3857

NEW CASTLE COUNTY

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation of the State of Connecticut, HOME INSURANCE COMPANY, a corporation of the State of New Hampshire, NEW HAMPSHIRE INSURANCE COMPANY, a corporation of the State of New Hampshire, CONTINENTAL CASUALTY COMPANY, a corporation of the State of Illinois, UNITED STATES FIRE INSURANCE COMPANY, a corporation of the State of New York, INSURANCE COMPANY OF NORTH AMERICA, a corporation of the State of Pennsylvania, CONTINENTAL INSURANCE COMPANY, a corporation of the State of New Hampshire, UNITED STATES LIABILITY INSURANCE CO., a corporation of the State of Pennsylvania, NATIONAL UNION FIRE INSURANCE COMPANY, a corporation of the Commonwealth of Pennsylvania, TWIN CITY FIRE INSURANCE COMPANY, a corporation of the State of Minnesota, AETNA CASUALTY AND SURETY COMPANY, a corporation of the State of Connecticut, and ZURICH INSURANCE COMPANY, A Swiss corporation,

CONTINENTAL CASUALTY COMPANY ("CNA"),
Appellant

SUR PETITION FOR REHEARING

Present: BECKER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH *Circuit Judges* and POLLAK, *District Judge**

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ [Illegible]
Circuit Judge

Dated: Nov. 18, 1992

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* Judge Pollak voted only on panel rehearing.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3857

NEW CASTLE COUNTY

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation of the State of Connecticut, HOME INSURANCE COMPANY, a corporation of the State of New Hampshire, NEW HAMPSHIRE INSURANCE COMPANY, a corporation of the State of New Hampshire, CONTINENTAL CASUALTY COMPANY, a corporation of the State of Illinois, UNITED STATES FIRE INSURANCE COMPANY, a corporation of the State of New York, INSURANCE COMPANY OF NORTH AMERICA, a corporation of the State of Pennsylvania, CONTINENTAL INSURANCE COMPANY, a corporation of the State of New Hampshire, UNITED STATES LIABILITY INSURANCE CO., a corporation of the State of Pennsylvania, NATIONAL UNION FIRE INSURANCE COMPANY, a corporation of the Commonwealth of Pennsylvania, TWIN CITY FIRE INSURANCE COMPANY, a corporation of the State of Minnesota, AETNA CASUALTY AND SURETY COMPANY, a corporation of the State of Connecticut, and ZURICH INSURANCE COMPANY, A Swiss Corporation

CONTINENTAL CASUALTY COMPANY ("CNA"),
Appellant

On Appeal From the United States District Court
for the District of Delaware
(D.C. Civil Action No. 85-00436)

Present: Greenberg and Nygaard, *Circuit Judges*, and Pollak, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel June 18, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered November 12, 1991 as amended by the order entered November 21, 1991, be, and the same is hereby reversed and the cause is remanded to the District Court with instructions to enter judgment for Continental. Costs taxed against appellees. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
Clerk

Dated: July 28, 1992

Certified as a true copy and issued in lieu of a formal mandate on November 27, 1992.

Attest: /s/ [Illegible]

Acting Chief Deputy Clerk,
U.S. Court of Appeals for the Third Circuit.

Pursuant to Rule 39(d), F.R.A.P., costs taxed against Appellee added hereto on January 15, 1993 as follows:

Brief	$ 271.34
Reply Brief	151.20
Appendix	1421.78
TOTAL	$1844.32

APPENDIX E

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

C.A. No. 87C-SE-11

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, a foreign corporation, *et al.*,
Plaintiffs,

v.

RHONE-POULENC BASIC CHEMICALS CO., a Delaware Corporation, *et al.*,
Defendants.

ORDER

Submitted: July 15, 1991

Decided: January 16, 1992

On Defendant Stauffer's Motion for Partial Summary Judgment on Travelers' Duty to Defend—Granted in Part, Denied in Part.

On Defendant Stauffer's Motion for Partial Summary Judgment on AMICO's Duty to Defend—Granted in Part, Denied in Part.

On Defendant Stauffer's Motion for Partial Summary Judgment on National Union's Duty to Defend—Granted in Part, Denied in Part.

On Plaintiff AMICO's Cross-Motion for Summary Judgment on the Duty to Defend—Granted in Part, Denied in Part.

On Plaintiff AMICO's Motion for Summary Judgment on the Duty to Indemnify—Granted in Part, Denied in Part.

On Plaintiff Travelers' Cross-Motion for Summary Judgment on the Duty to Defend—Granted in Part, Denied in Part.

Thomas Reed Hunt, Jr., Esquire and Brett D. Fallon, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; and Joseph C. Kelly, Esquire, Pamela B. Levinson, Esquire, of ICI Americas, Inc., Wilmington, Delaware; and Robert N. Sayler, Esquire, Marc S. Mayerson, Esquire, Martin Wald, Esquire, William T. O'Neill, Esquire, of Covington & Burling, Washington, DC; and Matthew L. Jacobs, Esquire, Karla J. Letsche, Esquire, of Kirkpatrick & Lockhart, Washington, DC; and Glen R. Stuart, Esquire, Richard H. McAdams, Esquire, of Morgan, Lewis & Bockus, Philadelphia, Pennsylvania, for defendants Rhone-Poulenc Basic Chemicals Co., et al.

Michael Weiss, Esquire, of Kimmel, Weiss & Carter, Wilmington, Delaware; and Robert A. Zeavin, Esquire, John A. Granies, Esquire, Adrienne F. Millican, Esquire, of Buchalter, Nemer, Fields & Younger, Los Angeles, California for plaintiff National Union Fire Insurance Company of Pittsburgh, Pennsylvania.

Gary W. Aber, Esquire, Donald L. Gouge, Jr., Esquire, of Heiman, Aber & Goldlust, Wilmington, Delaware; and Robert Cusumano, Esquire, Barry R. Ostrager, Esquire, Stephen Gimigliano, Esquire, of Simpson, Thacher & Bartlett, New York, New York; and Charles R. Beeman, Esquire, of Courdert Brothers, New York, New York; and William Samoska, Esquire, of Courdert Brother, Los Angeles, California for plaintiff The Travelers Indemnity Company.

Robert K. Beste, Esquire, of Biggs & Battaglia, Wilmington, Delaware, and S. Elizabeth Doran, Esquire, of

Drinker, Biddle & Reath, Washington, DC for plaintiff American Motorists Insurance Company.

POPPITI, Judge

This 16th day of January, it appears to the Court that:

1. American Motorists Insurance Company ("AMICO"), The Travelers Indemnity Company ("Travelers") and National Union Fire Insurance Company of Pittsburgh, PA ("National Union") (collectively "Plaintiffs") filed this declaratory judgment action against their insured, Stauffer Chemical Company ("Stauffer"), now operating under the name of Rhone-Poulenc Basic Chemicals Co. ("Defendant").[1] Plaintiffs seek a declaration that they are not obligated under their respective comprehensive general liability ("CGL") policies to defend or indemnify Defendant in three lawsuits which allege environmental damage resulting in part from Defendant's disposal of waste at Tybouts Corner landfill ("Tybouts Corner") in New Castle County, Delaware.

The matter is presently before the Court on Defendant's Motion for Partial Summary Judgment on the Duty to Defend, and Travelers' Cross-Motion for Summary Judgment on the Duty to Defend. Also before the Court

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[1] The action as initially filed named Stauffer Chemical Company and Stauffer Basic Chemical Holdings, Inc. as defendants. I ordered an amendent of the caption and pleadings which leaves Rhone-Poulenc Basic Chemicals Co. ("Rhone-Poulenc") as the sole named defendant in order to reflect the fact that Stauffer Basic Chemical Holdings, Inc. has been merged out of existence and that the Stauffer Chemical Company in existence at the time this action was filed, the successor-in-interest to the Stauffer Chemical Company which purchased the insurance policies here at issue, is now operating under the name of Rhone-Poulenc. *See National Union Fire Ins. Co. of Pittsburgh, PA v. Stauffer Chemical Co.*, Del. Super., C.A. No. 87C-SE-11, slip op. at 7, 12-13, Poppiti, J. (July 15, 1991) (ORDER).

is AMICO's cross-motion for summary judgment on both the duty to defend and the duty to indemnify.[2]

FACTS

2. Plaintiffs issued CGL insurance policies to Defendant collectively covering the 12-year period from 1969 through 1981. Plaintiff AMICO's policies cover the period from January 1, 1969 to March 1, 1971, Plaintiff Travelers' policies cover the period from March 1, 1971 to July 1, 1977, Plaintiff National Union's policies cover the period from July 1, 1977 to January 15, 1981. It is undisputed that all policies were issued and delivered to Defendant and all applicable premiums were timely paid.

Each of the CGL policies at issue contains essentially the same insuring agreement. Travelers' insuring agreement reads as follows:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this policy applies caused by an occurrence, or personal injury, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such injury or damage, even if any of the allegations of the suit are groundless, false or fraudulent. . . .

Affidavit of Sophia Drewnowski (Dkt. 105) ("Drew. Aff."), Ex. 1 at 005825. *See also* Appendix to Defendants' Motion for Partial Summary Judgment on the Plaintiff Insurer's Duty to Defend (Dkt. 78) ("App. to Defendant's Motion") Ex. G at 002431 (National Union's insuring agreement).[3] "Occurrence" is defined in

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[2] National Union has filed opposition to Defendant's motion but has not cross-moved for partial summary judgment.

[3] The insuring agreement in AMICO's policy is essentially identical to that set forth above except that it does not contain the

the policies as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Drew. Aff., Ex. 1 at 005835; Gotschalk Aff. App. B, Ex. 14 at 2; App. to Defendant's Motion, Ex. G at 002442.

The CGL policies issued by Travelers and National Union [4] contain the following pollution exclusion and "expected or intended" exception to the exclusion:

> It is agreed that this insurance does not apply:
>
> (a) to bodily injury or property damage arising out of any emission, discharge, seepage, release or escape of any liquid, solid, gaseous or thermal waste or pollutant.
>
> (1) If such omission, discharge, seepage, release or escape is either expected or intended from the standpoint of any insured or any person or organization for whose acts or omissions any insured is liable, or
>
> (2) resulting from or contributed to by any condition in violation of or non-compliance with any governmental rule, regulation or law applicable thereto. . . .

Drew. Aff., Ex. 1 at 005848; App. to Defendant's Motion, Ex. G at 002423.[5]

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words "or personal injury" appearing in line 5-6. *See* Affidavit of Patricia A. Gotschalk App. B (Dkt. 97) ("Gotschalk Aff. App. B") Ex. 14 at 3.

[4] The National Union policies also contain a so-called absolute pollution exclusion in addition to the exclusion set forth above. *See* App. to Defendant's Motion, Ex. G at 002436. The issue of how these two exclusions are to be reconciled in interpreting National Union's policies will be addressed *infra*.

[5] Apparently, the pollution exclusion contained in the policies issued by AMICO varies from the exclusion set forth above,

Defendant operated a polyvinyl chloride ("PVC") manufacturing plant in Delaware City, Delaware ("Delaware City Plant") from 1966 through 1980. Wastes from the plant were disposed of at Tybouts Corner from 1969 until July of 1971, when the landfill reached its capacity and was closed.

Tybouts Corner was a sanitary landfill operated by New Castle County and the owners of the property.[6] The landfill began accepting wastes in January of 1969. As a prerequisite to the operation of a landfill at Tybouts, the State of Delaware required the County to comply with the permit requirements of the Delaware State Board of Health ("Board of Health") and the Delaware State Water and Air Resources Committee ("WARC"), in addition to the regulations adopted by the Board of Health, entitled the State Solid Waste Disposal Code ("the Code").[7] On December 9, 1968, WARC issued a

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eliminating coverage for all but "sudden and accidental" pollution. AMICO has advanced no argument on this exclusion in its cross-motion, but has reserved the right to raise the issue at a later time. *See* Memorandum of Law of American Motorists Insurance Company in Opposition to Defendant's Motion for Partial Summary Judgment, and in Support of American Motorists Insurance Company's Cross-Motion for Summary Judgment (Dkt. 95) ("AMICO's Opening Memo") at 9 n.26.

[6] The property at Tybouts was owned by William and Elizabeth Ward. The Wards leased the property to the County.

[7] The Code required approval by the Board of Health before "hazardous" or "industrial" wastes could be deposited at any landfill. Section 38.42(b)(10) of the Code provides:

> Special solid waste. Hazardous wastes industrial wastes, and sewage treatment residues shall not be deposited at any landfill without first submitting a plan for such disposal to the Board of Health and obtaining approval of this plan from the Board of Health.

Affidavit of Michael Tankersley (Dkt. 180) ("Tank. Aff.") Ex. D at S100605. Section 38.108 of the Code defines "hazardous solid wastes" as "[t]hose wastes which by reason of their pathological, explosive, flammable, radioactive, chemical or toxic nature require

certificate of approval ("the permit") to the County. Condition 14 of the permit stated that "[t]he disposition of chemicals and/or toxic materials shall be prohibited except by special permission of the Commission." Drew. Aff., Ex. 26 at 000047. The permit further required the County to establish a program of research and testing whereby the landfill site, surface and subsurface waters would be sampled to determine water quality and surface and subsurface hydrological characteristics. *Id.* On December 23, 1968, the Board of Health granted approval to the County to operate a landfill at Tybouts.

In February of 1969, the County entered into a contract with the University of Delaware, pursuant to which the University monitored the quality of the groundwater at Tybouts and issued periodic reports for the State and the County. These reports, which covered data collected over the period from July of 1969 through June of 1971, indicated leachate movement from the solid wastes into the groundwater in the landfill area and depicted fluctuating but progressive deterioration of the groundwater. Affidavit of Adrienne F. Millican (Dkt. 94) ("Millican Aff."), Exs. A-C.[8] However, the reports indicated that the level of contamination was not serious and that there was no significant pollution. *See id.*

No testing of the groundwater at Tybouts was done between June of 1971 and March of 1974, when the

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handling methods which are different than those used for other refuse." *Id.*, at S100607. Section 38.109 defines "industrial solid wastes" as "[s]olid wastes resulting from industrial processes and manufacturing operations, including but not limited to: food processing wastes, wood scraps, metal scraps, shavings, cartons, chemicals, cinders, and liquid process wastes." *Id.*

[8] The Univerity issued its first report in August of 1969, approximately 7 months after the landfill became operational. This report concluded that "there has been no major contamination of the ground water" and that although "[s]ome leachate has been introduced into the ground water . . . the levels of contaminants are quite low." Millican Aff., Ex. A at 0004470.

County hired Edward H. Richardson Associates ("Richardson") to perform a water quality study. Richardson's first report issued in March of 1974, indicated that "[t]he previous monitoring program, which was curtailed in June of 1971, was apparently stopped prior to active commencement of production of leachate," that the quality of groundwater changed significantly sometime during the second year after Tybouts closed, and that "the production of leachate may still be in a progressive stage." Gotschalk Aff. App. A (Dkt. 96), Ex. 2 at S100215-16. A second report issued by Richardson in November of 1974 stated that "to date, the landfill does not appear to represent an immediate environmental t[h]reat." *Id.*, Ex. 3 at S100255.

On May 14, 1976, nearly five years after Tybouts was closed, the State informed the County that the private drinking water well of Sarah Wagner ("Wagner well"), located near Tybouts, was contaminated and that Tybouts was the probable source of the contaminants. Three lawsuits have since been filed naming Stauffer as a defendant. The plaintiff insurers have refused to defend Stauffer in these suits.

In *United States v. New Castle County*, C.A. No. 80-489 (D.Del. filed Oct. 4, 1980) ("*USA* action"), the federal government filed suit pursuant to Section 7003 of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6973, and Section 104, 106 and 107 of the Comprehensive Environmental Response, Conversation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9604, 9606, 9607, 9613. The complaint alleges that Stauffer's Delaware City Plant discarded or disposed of approximately 15,100 tons of waste from the production of PVC at Tybouts, and that the waste consisted of sludge containing residual vinyl chloride monomer 1, 2-dichloroethane and trichloroethylene, which are alleged to be known carcinogens. Third Amended and Supplemental Complaint paras. 21, 22, 30, 31, App. to Defendant's Motion, Ex. J. It is further alleged that the

waste which was deposited, dumped, disposed of, or otherwise placed on and into the landfill at Tybouts by all of the defendants, including Stauffer, "is creating a leachate that is percolating downward through the soil and is entering the underlying groundwater," and that the Wagner well has been contaminated and the users of the well have had to rely on alternative water supplies since 1974. *Id.* paras. 28, 29. The complaint seeks injunctive relief to abate an alleged endangerment to the health and welfare of persons and the environment presented by the waste disposal at Tybouts, the recovery of monies expended by the government for investigative activities and other response actions related to contamination at and from Tybouts, and a declaratory judgment awarding the government monies to be expended in the future for response actions.[9]

In *Wagner v. New Castle County*, Del. Ch., C.A. No. 82-7008 (filed Nov. 10, 1982), Sarah Wagner sued Stauffer and other defendants for injunctive relief and damages.[10] Similar to the *USA* complaint, the Wagner complaint alleges that Stauffer's Delaware City Plant discarded or disposed of waste at Tybouts containing known carcinogens, that this waste together with other waste found at Tybouts is creating a leachate that is entering the groundwater, and that the Wagner well has been contaminated and the users of the well have had to rely upon alternative water supplies since 1974. *See Wagner* complaint, App. to Defendant's Motion, Ex. K, paras. 17, 18, 19, 20, 21, 22, 23. Counts I and II of the *Wagner* complaint assert claims of trespass and nuisance,

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[9] Stauffer and the other parties to the *USA* action entered into a Consent Decree, which was signed by Judge Longobardi on April 20, 1989, settling the action. Under the Consent Decree, Stauffer is required to share the expenses of the implementation of the "Remedial Design" and "Remedial Action" at Tybouts. *See* Gotschalk Aff. App. A, Ex. 10.

[10] Sarah Wagner is also a plaintiff in *Andrews v. New Castle County*, C.A. No. 84-124 (D.Del. filed March 2, 1984), and apparently has not actively litigated the *Wagner* action since 1983.

respectively. Count III of the complaint, labeled "WILLFUL CONDUCT", alleges that "[t]he damage to plaintiff's property was and is a result of the willful or wanton conduct of all defendants, in that they knowingly or recklessly released contaminants into the soil which contaminants they knew or should have known would migrate to plaintiff's property." *Id.* para. 33. Count III also asserts in the alternative a claim of negligence, alleging that "defendants negligently released the afore-described contaminants into plaintiff's drinking water and/or the surrounding water system." *Id.* para. 34.

Finally, in *Andrews v. New Castle County*, C.A. No. 84-124 (D.Del. filed March 2, 1984), several residents of the area surrounding Tybouts filed a class action against Stauffer and other defendants seeking injunctive relief, as well as compensatory and punitive damages for, *inter alia*, property damage and personal injury resulting from alleged releases and threatened releases of hazardous waste from Tybouts into the groundwater from which plaintiffs obtain their drinking water. The complaint alleges that New Castle County and Uldis Karins, County Engineer for New Castle County, entered into a secret agreement with Stauffer for the deposit of chemical wastes produced by Stauffer at Tybouts in contravention of the applicable operating standards. *Andrews* complaint, App. to Defendant's Motion, Ex. L para. 47. It is further alleged that Stauffer "knew that its wastes to be deposited in the landfill were highly toxic and would cause groundwater pollution and surface water pollution in the area around Tybouts. . . . Stauffer Chemical knew that its wastes could not be safely deposited at the landfill and failed to fully disclose the nature of the waste to New Castle County. *Id.* para. 48.[11] The com-

[11] Paragraph 85 of the *Andrews* complaint alleges that "the defendants continually and knowingly violated or participated in the violation of the applicable operating standards for the landfill . . . ." *Id.* para. 85.

plaint asserts, *inter alia*, claims of nuisance, trespass, negligence, a violation of the Federal Pollution Control Act, and a violation of due process rights under the Fourteenth Amendment. Count I of the complaint alleges that Stauffer, among other defendants, arranged for the disposal or transport for disposal of hazardous substances possessed by it at Tybouts, *Id.* para. 96. This court further alleges "[t]here have been and are continuing to be releases and threatened releases of hazardous waste from the Tybouts Corner Landfill into the groundwater from which plaintiffs obtain their drinking water," and that such releases are the proximate cause of response costs incurred and to be incurred. *Id.* para. 98. Count VII alleges that "Defendants were negligent in depositing hazardous waste into and the operation of the Tybouts Corner Landfill." *Id.* para. 122. Count VIII alleges that Stauffer and other defendants conspired with or induced other defendants to: cause dangerous and toxic wastes to be allegedly deposited at Tybouts, conceal the dumping of such wastes from those persons likely to be injured by such dumping, create a nuisance and abnormally dangerous condition at Tybouts, and cause pollution to be discharged from Tybouts into navigable waters. *Id.* para. 125.

Stauffer seeks partial summary judgment on the duty to defend on the basis that the allegations of the underlying suits raise the potential of insurance coverage for Stauffer's ultimate liability.

Travelers opposes Stauffer's motion and cross-moves for summary judgment on the duty to defend on the following six grounds: (a) that the losses alleged were no fortuitous risks at the effective date of Travelers' policies, but were instead uninsurable known losses; (b) that Travelers has not duty to defend the *USA* action because the injunctive and restitutional relief sought in this action does not constitute "damages"; (c) that the alleged pollution did not result from an "occurrence" as

defined in the policies because the pollution damage was expected and intended; (d) that amounts sought in the underlying action are excluded from coverage under Travelers' pollution exclusion clause; (e) that Stauffer failed to give proper notice to Travelers of the alleged occurrence and the resultant *Andrews* suit; and, (f) that Stauffer concealed material facts such that it breached its duty to deal with Travelers in good faith.

AMICO opposes Stauffer's motion and seeks summary judgment on the duty to defend and the duty to indemnify on the following grounds: (a) the underlying suits do not seek "damages"; (b) there is no coverage under AMICO's policies for the mitigation measures sought in the underlying actions; (c) no "property damage" or "bodily injury" is alleged to have taken place during an AMICO policy period; and, (d) Stauffer failed to provide timely notice of the *Andrews* action.

National Union asserts that it has no duty to defend Stauffer because (a) the underlying claims were known losses at the inception of National Union's policy period; (b) its policies exclude coverage for the cleanup of pollution; (c) its policies exclude coverage for pollution damage contributed to or resulting from violation of law or regulation; and, (4) Stauffer failed to provide timely notice of the *Andrews* action.

DISCUSSION

3. Superior Court Civil Rule 56(c) provides, in pertinent part:

> [Summary judgment] shall be rendered . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

On a motion for summary judgment, the facts are considered in a light most favorable to the non-moving party.

Pullman, Inc. v. Phoenix Steel Corp., Del. Supr., 304 A.2d 334, 335 (1973); *Markland v. Baltimore O.R.R.*, Del. Super., 352 A.2d 89, 90 (1976). When cross-motions for summary judgment are presented to the Court, neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law. *Empire of America Relocation Servs., Inc. v. Commercial Credit Co.*, Del. Supr., 551 A.2d 433, 435 (1988) (citation omitted).

A. *Duty to Defend.*

Each insurance policy at issue in this case includes a provision relative to the insurer's duty to defend. Travelers' policy provides:

> [T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of [bodily injury or property damage to which this policy applies caused by an occurrence, or personal injury] even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient. . . .

Drewnowski Aff. (Dkt. 105) Ex. 1 at 005825 (Travelers' policy); *See also* Appendix to Defendants' Motion for Partial Summary Judgment (Dkt. 78) Ex. G at C02431 (National Union's policy); Gotschalk Aff., App. B (Dkt. 97) Ex. 14 at 3 (AMICO's policy).

It is well settled that an insurer's duty to defend is broader than its duty to indemnify. *See Charles E. Brohawn & Bros. Inc. v. Employers Commercial Union Ins. Co.*, Del. Supr., 409 A.2d 1055, 1058 (1979); *New Castle County v. Hartford Accident & Indem. Co.*, 673 F.Supp. 1359, 1366-7 (D.Del. 1987). The duty to defend is determined by comparing the allegations contained in the underlying complaint with the terms of the policy. *See Continental Casualty Co. v. Alexis I. du Pont School*

Dist., Del. Supr., 317 A.2d 101, 103 (1974); *August T. Bellanca and the Aetna Casualty & Surety Co. v. Insurance Company of North America*, Del. Supr., No. 249, 1983, slip op. at 2, McNeilly, J. (Jan. 6, 1984) (ORDER). The test is whether the underlying complaint, read as a whole, alleges a risk within the coverage of the policy. *Continental Casualty*, 317 A.2d at 103, 105 (1974); *Brohawn*, 409 A.2d at 1058. The Delaware Supreme Court has articulated the following principles to be applied in determining whether an insurer has a duty to defend an action against its insured:

> (a) where there exists some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured;
>
> (b) any ambiguity in the pleadings should be resolved against the carrier;
>
> (c) if even one count or theory of plaintiff's complaint lies within the coverage of the policy, the duty to defend arises.

Continental Casualty, 317 A.2d at 105.

Plaintiffs argue that if the Court finds any ambiguity as to coverage after reviewing the complaints in the underlying actions, facts outside the four corners of the complaint should be considered in determining the duty to defend. Further, it is argued that if the Court finds an issue of fact, the insurers should not be required to defend until coverage is established. *See* Memorandum of Law of The Travelers Indemnity Company in Opposition to Stauffer's Motion and In Support of Travelers' Cross Motion (Dkt. 104) ("Travelers' Opening Memo") at 2-3; Memorandum of Law of American Motorists Insurance Company in Opposition to Defendant's Motion for Partial Summary Judgment and in Support of AMICO's Cross-Motion (Dkt. 95) ("AMICO's Opening Memo") at 21; Answering Brief of Plaintiff National Union Fire

Insurance Company of Pittsburgh, PA in Opposition to Motion for Summary Adjudication Filed by Defendants (Dkt. 99) ("National Union's Answering Brief") at 8. I disagree.

Plaintiffs rely on *Rite Aid Corp. v. United States Fire Ins. Co.*, C.A. No. 82C-JL-65, Balick, J. (Feb. 3, 1984) (ORDER). In *Rite Aid*, an insured sought a declaratory judgment that its insurer had an obligation to defend and indemnify it in a pending civil action. The civil action was brought by the insured's landlords who claimed, *inter alia*, that the insured failed to notify the landlords of a leaking roof until extensive structural damage had occurred. The underlying complaint alleged that a leak in the roof developed "at some point during the defendant's tenancy" and there was "continuing damage." *Id.*, slip. op. at 1. The insurer's policy period did not extend over the insured's entire tenancy. *Id.* The insurer argued that there was no "occurrence" as defined in its policy because the alleged damage did not occur "unexpectedly" and did not occur "during the policy period." *Id.*, slip op. at 2. On cross-motions for summary judgment, after finding that the underlying complaint did not directly address the issues raised in the declaratory judgment action and that it was unlikely that such would be determined in the underlying action, the court stated:

> Although there is authority for the view that an insurance company has a duty to defend if the claim alleged might be covered, I find more persuasive the view that when coverage cannot be determined from the pleadings in the underlying action, the duty to defend depends on the actual facts.

Id., slip op. at 2 (citing R. Keeton, Basic Text on Insurance Law § 7.6(a) at 464-6 (1971)). The court stated further that "when the complaint does not allege a state of acts within the coverage of the policy, the better rule is not to require the insurer to defend until coverage has

been established." *Id.*, slip op. at 3. The court denied the cross-motions for summary judgment, finding the record insufficient to determine coverage as a matter of law. *Id.*

In my view, the *Rite Aid* decision is directly at odds with Delaware Supreme Court authority and I am therefore precluded from following it. Insofar as *Rite Aid* directs that facts outside the underlying complaints should be considered in determining the duty to defend, the decision directly conflicts with Supreme Court authority holding that an insurer's duty to defend is to be determined solely on the basis of the allegations contained in the underlying complaint against the insured. *See Bellance, supra*, slip op. at 2 ("[T]he duty to defend is measured by the allegations in the complaint. . . ."); *Continental Casualty*, 317 A.2d at 103 ("In determining whether the third party's action against the insured states a claim covered by the policy, we must look to the allegations of the complaint. . . . The test is whether the complaint alleges a risk within the coverage of the policy." (citations omitted)); *Brohawn*, 409 A.2d at 1058 (restating the standard esablished in *Continental Casualty*). *See also Johnson v. Talley Ho, Inc.*, Del. Super., 303 A.2d 677, 679 (1973) (Superior Court case predating *Continental Casualty* stating that "[t]he widely accepted rule is that an insurer's duty to defend an action against an insured is measured by the allegations in plaintiff's pleadings." (citations omitted)); *The Travelers Indem. Co. v. Dingwell*, Me. Supr., 414 A.2d 220, 224 (1980) (applying a "comparison test" for determining an insurer's duty to defend which involved laying the underlying complaints alongside the insurance policy and then determining whether the pleadings were adequate to encompass an occurrence within the coverage of the policy, and noting that under this test "the duty to defend is based exclusively on the facts *alleged* rather than on the facts as they actually are." (citations omitted)).

Further, insofar as *Rite Aid* holds that an insurer should not be required to defend its insured until coverage has been established when coverage cannot be determined from the pleadings in the underlying action, see *Rite Aid*, slip op. at 3, the decision is in discord with the Delaware Supreme Court's decision in *Continental Casualty*. In *Continental Casualty*, the Supreme Court instructed that in determining an insurer's obligation to defend, any doubt as to whether the complaint against the insured alleges a risk insured against should be resolved in favor of the insured. *See Continental Casualty*, 317 A.2d at 105 (subsection (a), set forth *supra* p. 15).[12] The adoption of this principle in *Continental Casualty* confirms that in Delaware, an insurer's duty to defend its insured arises when the allegations of the underlying complaint show a *potential* that liability within coverage will be established. *See C.H. Heist Caribe Corp. v. American Home Assur. Co.*, 640 F.2d 479, 483 (3d Cir. 1981) (stating that the duty to defend arises "if the allegations of the complaint 'state on their face a claim against the insured to which the policy *potentially* applies,'" and that "the factual allega-

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[12] In *Rite Aid*, the court stated that the complaint did not directly address the issues raised in the declaratory judgment action. *Rite Aid*, slip op. at 2. Apparently, those issues included: whether damage occurred "during the policy period," and whether the damage occurred "unexpectedly" as required under the policy's definition of "occurrence." *See id.* Under the principle adopted by the Supreme Court in *Continental Casualty*, set forth *supra*, a complaint need not allege facts which permit the court to resolve such issues in order to trigger the insurer's defense obligation; rather, the complaint need only raise a doubt as to coverage. If the facts alleged in the underlying compliant in *Rite Aid* left open the possibility that damage occurred "unexpectedly" and "during the policy period"—either because the complaint was silent on these issues or did not state facts with sufficient definiteness to permit a resolution of these issues—then there was doubt as to whether the complaint alleged a risk insured against, and *Continental Casualty* requires such doubt to be resolved in favor of the insured.

tions of [the third party's] complaint against [the insured] are controlling." (citation omitted)); *New Castle County v. Hartford Accident and Indem. Co.*, 673 F.Supp. 1359, 1367 (D.Del. 1987) (recognizing that under Delaware law "insurers are required to defend any action which *potentially* states a claim which is covered under the policy." (emphasis added) (citing *Brohawn*, 409 A.2d at 1058; *C.H. Heist Caribe*, 640 F.2d at 483)); *The Travelers Indem. Co. v. Dingwell*, Me., 414 A.2d 220, 226 (1980) ("The dominant rule in other jurisdictions is that the insured has the right to a defense whenever the allegations show a *potential* that liability will be established within the insurance coverage, even when the allegations are broad, and uncertain as to specific facts." (emphasis) (citations omitted)), *Avondale Indus., Inc. v. The Travelers Indemnity Co.*, 887 F.2d 1200, 1204 (2d Cir. 1989) ("The duty to defend rests solely on whether the complaint in the underlying action contains any allegations that arguably or potentially bring the action within the protection purchased." (citing *Technicon Elec. Corp. v. American Home Assurance Co.*, 544 N.Y.S.2d 531 (1989)).[13]

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[13] Professors Keeton and Widiss state the following in their treatise:

> There is impressive and substantial support among the judicial precedents for an expansive view of the duty to defend when the third party's pleadings are ambiguous in regard to either the possible theories of liability or some fact that is central to the existence of coverage. In such cases, the courts typically reason that the ambiguity in the pleadings indicates that there is a possibility of liability and that therefore the obligation to defend exists in these circumstances in the same way it does when there is at least one claim in the complaint that would be covered. Thus, when any doubt about coverage is produced by ambiguities in the complaint—that is, 'where the complaint does not state facts with sufficient definiteness to clearly bring the claims within or without coverage of the policy * * *'—that doubt is resolved so as to 'trigger' the insurer's obligation to

An insurer then can be excused from its duty to defend only if it can be determined as a matter of law that there is no possible factual or legal basis upon which the insurer might eventually be obligated to indemnify the insured. *Villa Charlotte Cronte, Inc. v. Commercial Union Ins. Co.*, N.Y. Ct. App., 476 N.E.2d 640, 641 (1985) (citations omitted). The burden is on the insurer to establish that policy exclusions or exemptions apply in a particular case, and that they are subject to no other reasonable interpretation. *Avondale Indus., Inc. v. The Travelers Indem. Co.*, 887 F.2d 1200, 1204 (2d Cir. 1989) (citations omitted) (applying New York law). *See also U.S. Fidelity and Guar. Co. v. Thomas Solvent Co.*, 683 F.Supp. 1139, 1147 (W.D. Mich. 1988). Therefore, in order to avoid the duty to defend, the insurer must demonstrate that the allegations of the underlying complaints are "solely and entirely" within specific and unambiguous exclusions from coverage. *Id.* at 1204-5 (citations omitted). This articulation of the standard, including its allocation of the burden of proof, is in accordance with the standard and principles adopted by the Delaware Supreme Court regarding the duty to defend, see *supra* p. 19, and I am therefore satisfied that it should be applied in the present case.

B. *Applicable Rules of Contract Construction.*

Under Delaware law, clear and unambiguous language in insurance policies should be given its ordinary, usual meaning. *Johnson v. Tally Ho, Inc.*, Del. Super., 303 A.2d 677, 679 (1973). However, where there is some ambiguity in the policy language such language is construed most strongly against the insurer and in favor of the insured. *The Aetna Casualty and Sur. Co. v. Kenner*,

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provide a defense if there is potentially a basis of liability within the scope of the insurance coverage.

R. Keeton & A. Widiss, Insurance Law § 9.3(a)(3), at 1020-21 (1988).

Del. Supr., No. 93, 1989, slip op. at 5-6, Walsh, J. (Feb. 21, 1990); *Hallowell v. State Farm Mutual Auto. Inc. Co.*, Del. Super., 443 A.2d 925, 926 (1982) (citations omitted); *Steigler v. Insurance Co. of N.Am.*, Del. Super., 384 A.2d 398, 400-01 (1978) (citations omitted).[14] This rule of construction is commonly referred to as the doctrine of *contra proferentem*.[15]

AMICO argues that the doctrine of *contra proferentem* should not be applied in the present case because Defendant is a sophisticated commercial insured, with its own insurance and legal departments, represented by a sophisticated insurance brokerage company. I disagree. Application of the doctrine turns not on the size or sophistication of the insured, but rather on the fact that the policy language at issue is drafted by the insurer and is not negotiated. *See Hallowell*, 443 A.2d at 926 ("[A]n insurance contract is construed strongly against the insurer, and in favor of the insured, because the insurer drafted the language that is interpreted." (citations omitted)).[16]

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[14] Ambiguity exists where policy language permits two or more reasonable interpretations. *Hallowell*, 443 A.2d at 926 (citations omitted). *See also Kenner*, slip op. at 14-15 ("An ambiguity exists when two or more reasonable interpretations of a contract are possible.") (citations omitted)).

[15] *See Doyle v. Allstate Ins. Co.*, N.Y., 136 N.E.2d 484, (1956) (holding that terms of an insurance policy are interpreted according to their "natural and reasonable meaning"); *Ace Wire & Cable Co. v. Aetna Casualty & Sur. Co.*, N.Y., 457 N.E.2d 761 (1983) (holding that the terms of an insurance policy should be interpreted so as to correspond with "the reasonable expectation and purpose of the ordinary businessman."). *See also Insurance Co. of N. Am. v. Dayton Tool & Die Works Inc.*, N.Y., 443 N.E.2d 457 (1982) (indicating that where there is uncertainty regarding the meaning of policy language, the policy is construed to embrace coverage).

[16] In *New Castle County v. Hartford Accident and Indemnity Co.*, 933 F.2d 1162 (3d Cir. 1991) amended May 29, 1991, the U.S. Court of Appeals for the Third Circuit rejected the same argument advanced by AMICO here, recognizing that "[n]othing in Delaware

Therefore, I am satisfied that the *contra proferentem* doctrine applies to the interpretation of ambiguous language included in the insurance policies here at issue where such language is standardized policy language drafted by the insurance industry and there is no evidence that the language in question was negotiated.[17]

4. *THE ANDREWS ACTION.*

Plaintiffs assert that Defendant did not provide timely notice of the *Andrews* action as required by the policies and therefore Plaintiffs have no duty to defend or indemnify Defendant of this action. The CGL policies at issue contain essentially the same provisions regarding notice. Travelers' policies provide:

> (4) Insured's Duties in the Event of Occurrence, Claim or Suit.
>
> a. In the event of an occurrence . . . written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the insured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents *as soon as practicable after the insured's Insurance Director becomes aware of such occurrence*. . . .

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insurance law suggests that a different rule of construction applies whenever the insured is a sophisticated purchaser of insurance." *Id.* at 1189. The court further stated: "[W]e can conceive of no compelling reason why even a sophisticated insured should not be entitled to a pro-coverage interpretation of a standardized ISO policy drafted by the insurance industry." *Id.*

[17] The only evidence submitted by AMICO which indicates that specific policy language was negotiated relates to the notice provisions contained in the policies. *See infra* p. 29.

> b. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

Drewnowski Aff. (Dkt. 105) Ex. 1 at 005839 (emphasis added). *See also* Appendix to Defendant's Motion for Partial Summary Judgment (Dkt. 78), Ex. B at 0090010 (AMICO's policy); Appendix to Defendants' Motion for Partial Summary Judgment (Dkt. 78) Ex. G at 002445 (National Union's policy).

The *Andrews* action was filed on March 2, 1984. Each plaintiff insurer asserts a delay of over two years in its receipt of notification of the *Andrews* action.[18] Defendant asserts that it informed Travelers of the *Andrews* action at the latest on November 14, 1984, referring to handwritten notes dated November 14, 1984 of a meeting between Stauffer's Director of Insurance and a Travelers' claims representative which indicate that the *Andrews* action was discussed, see Jacobs Aff. (Dkt. 113) Ex. C at 0051180, and that it notified the other insurers by November 25, 1985, referring to a November 25, 1985 letter from an insurance broker at Marsh & McLennan to Travelers which states "TO: VARIOUS INSURERS AT INTEREST AS COPIED PARTIES" and discusses the status of the *Andrews* action, see Defendants' Reply

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[18] Travelers asserts that it did not receive notice of the *Andrews* action until mid-1986, submitting in support a June 1986 Travelers' memorandum which refers to Tybouts Corner as a "new Stauffer loss." *See* Drewnowski Aff. (Dkt. 105) Ex. 34. National Union asserts that a March 20, 1987 letter from the brokerage firm of March & McLennan to National Union enclosing a copy of the *Andrews* complaint, was the earliest written notice it received of the *Andrews* action. *See* Klein Aff. (Dkt. 99) ¶ 2 & Ex. A. AMICO asserts that it was first advised of *Andrews* in October 1986 and that the *Andrews* complaint was not sent to AMICO until 1987. Affidavit of Richard F. Wildey ("Wildey Aff.") (Dkt. 91) para. 5.

Memorandum (Dkt. 112) at 39-40; Jacobs Aff. (Dkt. 113) Ex. E. Defendant has not asserted a specific date when written notice was sent to each plaintiff insurer or when its Insurance Director became aware of an occurrence.

I am satisfied that Defendant did not notify Plaintiffs of the underlying occurrence in the *Andrews* action "as soon as practicable" and therefore breached the notice provision set forth above in paragraph 4(a). In determining whether an insured has breached a policy provision requiring notice to be given "as soon as practicable," the question is whether notice was given within a reasonable time in view of the facts and circumstances of the particular case, and the mere lapse of time is not necessarily the determining factor. *State Farm Mutual Auto. Ins. Co. v. Johnson*, Del. Supr., 315 A.2d 585, 587 (1973).

The facts of the present case do not support a conclusion that notice was given within a reasonable time. Even assuming that Defendant's Insurance Director did not become aware of the "occurrence" underlying *Andrews* until the action was filed on March 2, 1984, and accepting Defendant's assertion that it notified Travelers no later than November 14, 1984 and the other plaintiff insurers by November 25, 1985, there was over an eight-month delay in notifying Travelers and an over twenty-month delay in notifying National Union and AMICO of the "occurrence." Defendant has not provided a single reason or excuse for its cunctation. *See id.* at 587-8 (holding 34-week delay in notifying insurer of accident was not "as soon as practicable" where the three reasons given by the insured for the delay were found to be insufficient justification for the delay); *Falcon Steel Co. v. Maryland Cas. Co.*, Del. Super., 366 A.2d 512, 514-15 (holding nine-month delay in notifying insurer after insured's president became aware of the claim being asserted against the insured was not reasonable under the facts and circumstances of the case and therefore was not given "as soon

as practicable" where the insured's president explained that the delay resulted from the failure of his secretary to carry out his instruction).[19]

I am further satisfied that Defendant breached the provision contained in each policy here at issue requiring the insured to "immediately forward" every demand, notice, summons or other process to the insurer in the event that a suit is brought against the insured. *See supra* p. 24 at ¶ 4(b). Neither the *Andrews* complaint, nor any other form of notification regarding the *Andrews* action, was forwarded to any of the plaintiff insurers by Defendant "immediately." *See Letter* dated March 20, 1987 from Lucille M. Turnbull of Marsh & McLennan to H. Battle of National Union, Klein Aff., Ex. A (letter encaptioned "TO: VARIOUS INSURERS AT INTEREST AS COPIES PARTIES" and referring to an enclosed copy of the *Andrews* Summons and Complaint, supporting that the *Andrews* complaint was not sent to the insurers until over three years after the action was filed). Defendant has not argued otherwise and has not asserted a date when a copy of the *Andrews* complaint was sent to each plaintiff.

Defendant argues in the alternative that untimely notice does not preclude coverage unless Plaintiffs can establish prejudice resulting from the untimely notice and

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[19] Defendant has not argued that notification of the *USA* and *Wagner* actions served as notification of the underlying occurrence in *Andrews*, asserting only that the timely notification of these actions supports its argument that Plaintiffs have not been prejudiced by any untimely notification of *Andrews*. *See* Defendant's Reply Memorandum at 43. Nevertheless, I am satisfied that notification of the *USA* and *Wagner* actions by Deefndant was not sufficient notification of the underlying occurrence in *Andrews* since the "occurrence" alleged in *Andrews* is not identical to that alleged in the *USA* or *Wagner* actions. The *Andrews* action alleges personal injury, in addition to property damage, which is not alleged in the *USA* and *Wagner* actions, and *Andrews* involves claims of many plaintiffs not parties to the other two actions.

that Plaintiffs have failed to do so here.[20] In *State Farm*, *supra*, the Delaware Supreme Court held that when an insured fails to meet his burden of proving compliance with a policy's notice condition requiring notice "as soon as practicable," the insurer will not be relieved of its liability under the policy unless the insurer is able to meet its burden of showing that it has been prejudiced by the noncompliance. *State Farm*, 320 A.2d at 347. The court refused to charge the insured strictly with the policy's notice condition, reading a requirement into the insurance policy that the insurer show prejudice before a breach of the notice provision could be used to defeat coverage. The holding in *State Farm* was premised however on the court's recognition that an insurance policy is an adhesion contract, not a truly consensual agreement, the terms of which are not talked out or bargained for.[21]

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[20] Travelers raises a choice of law issue for the first time in response to this argument, asserting that under New York law an insurer need not show prejudice resulting from untimely notice. *See* Travelers' Opening Memo (Dkt. 104) at 51 (citing, among other cases, *Utica Ins. Co. v. Fireman's Fund Ins. Co.*, 748 F.2d 118, 121 (2d Cir. 1984)). The parties have not briefed the issue. It appears that the only potentially-applicable state's law other than that of Delaware is that of New York, the alleged place of contracting. Having concluded that under Delaware law an insurer need not show prejudice resulting from an insured's breach of a notice condition where, as here, there is evidence that the notice condition was negotiated, see *infra*. p. 28-29, I am satisfied that all issues presented by the motions *sub judice* would be resolved the same under either New York or Delaware law. Therefore, resolution of the choice of law issue is unnecessary.

[21] In adopting the prejudice requirement discussed *supra*, the court in *State Farm* stated the following:

> Although some jurisdictions continue to describe insurance contracts as agreements to which the parties have voluntarily bound themselves with knowledge of strict policy provisions, we now follow New Jersey's lead in recognizing ". . . that the terms of an insurance policy are not talked out or bargained for as in the case of contracts generally, that the insured is charge-

In the present case, there is uncontroverted evidence in the record which indicates that language contained in the notice provisions in question was negotiated, confuting any conclusion that these provisions are adhesive in nature. Whereas the standard CGL notice provision requires that notice be given "as soon as practicable," *see* B. Ostrager & T. Newman, Handbook on Insurance Coverage Disputes § 4.02[b], at 76 (3d ed. 1990), deposition testimony in the record indicates that Defendant negotiated a more liberal provision, authorized by one of the Defendant's directors of insurance, allowing notice to be given "as soon as practicable after the insured's Insurance Director becomes aware of [an] occurrence." *See* Deposition of Walter Winans dated February 7, 1989 taken in relation to *Montrose Chem. Corp. v. Canadian Universal Ins. Co., Inc.*, Calif. Super., No. C-594-148, Gotschalk Aff., App. B (Dkt. 97) Ex. 15, at 419-20. Further, there is evidence that Stauffer understood the importance of providing timely notice. *See id.* at 387-8 (testimony of one of Defendant's former directors of insurance, recognizing that prompt notice of claims matters to the insurance companies was "[t]erribly important" and that "it was our [Stauffer's] responsibility to see to it that when there was a loss, they [the insurers] would be given full and timely cooperation."); Deposition of James J. Gallagher dated December 8, 1988 taken in relation to the *Montrose* litigation, Gotschalk Aff., App. B (Dkt. 97) Ex. 16, at 411-13 (recognizing that it was incumbent upon Stauffer to report claims against Stauffer in order to enable the insurers to investigate such claims and to set aside adequate reserves). I see no reason why an insured should not be charged

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able with its terms because of a business utility rather than because he read or understood them, and hence an insurance contract should be read to accord with the reasonable expectations of the purchaser so far as its language will permit."

State Farm, 320 A.2d at 347 (quoting *Cooper v. Government Employees Ins. Co.*, N.J. Supr., 237 A.2d 870 (1968)).

strictly with the terms of a policy's notice condition under these circumstances.[22] I am therefore satisfied that the rule adopted in *State Farm* requiring an insurer to show that it has been prejudiced by an insured's failure to comply with an insurance policy's notice condition, is inapplicable to the present case.

Having concluded from unrebutted evidence in the record that Defendant has breached the notice condition of the insurance policies at issue, I am satisfied that Plaintiffs have no duty to defend or indemnify Defendant for any liability imposed in the *Andrews* action. Accordingly, AMICO's cross-motion for summary judgment on the duty to defend and the duty to indemnify, insofar as it pertains to the *Andrews* action, only, is

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[22] The Third Circuit, applying Delaware law, has indicated that the doctrine of *contra proferentem*—a rule which derives from the fact that an insurance contract is an adhesion contract, similar to the rule adopted in *State Farm*—should not apply where the specific language in question is negotiated. *See New Castle County v. Hartford Accident and Indem. Co.*, 933 F.2d 1162, 1182-83 & n.43, 1189-90 (3d Cir. 1991) amended May 29, 1991. In rejecting the argument that the *contra proferentem* doctrine should not apply where the insured is a sophisticated purchaser with its own insurance brokers and legal advisors, the court, quoting *Boeing Co. v. Aetna Casualty & Sur. Co.*, Wash., 784 P.2d 507, 514 (1990), stated: "The specific language in question was not negotiated, therefore, it is irrelevant that some [insureds] have [in-house] counsel." *Id.* at 1189. *See also id.* at 1182 n.43 ("[W]e think that, under Delaware law, standard form insurance contracts (*which are not mutually negotiated*) are construed against the insurer as a matter of law." (emphasis added) (citing *Aetna Casualty & Sur. Co. v. Kenner*, Del. Supr., 570 A.2d 1172, 1174 (1990).

My conclusion that the notice provision of the policies here at issue are not adhesive in nature does not in my view preclude a finding that the remaining provisions of the policies are adhesive in nature such that the doctrine of *contra proferentem* should apply in interpreting such provisions where ambiguities arise. *See* p. 34-35 and note 28. There is no evidence in the record which indicates that any other policy provision or policy language, aside from the notice provisions, was negotiated.

HEREBY GRANTED. Travelers' cross-motion for partial summary judgment on the duty to defend, insofar as it pertains to the *Andrews* action, is HEREBY GRANTED.[23]

5. *COVERAGE FOR CLEANUP COSTS AND OTHER EQUITABLE RELIEF.*

A. *The "As Damages" Clause.*

Under the insuring agreement of each policy at issue, coverage extends to "all sums which the insured shall become legally obligated to pay *as damages* because of bodily injury or property damage." *See, e.g.*, Drew. Aff., Ex. A at 005825 (Travelers' policy). Travelers and AMICO argue that the term "damages" does not include injunctive or other equitable relief such as cleanup costs and, therefore, there is no coverage for or duty to defend the *USA* action which seeks exclusively such relief.[24] Defendant responds that the ordinary lay purchaser of a CGL policy would not understand the term to exclude governmentally-mandated cleanup costs of an equitable nature, asserting that the ordinary definition of "damages" does not make any distinction between sums awarded on equitable claims.

The issue of whether environmental cleanup costs constitute "damages" as the term is used in standard CGL

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[23] Travelers has not cross-moved for summary judgment on the duty to indemnify, and National Union has not cross-moved for summary judgment on either the duty to defend or the duty to indemnify. Upon filing of the appropriate motions and forms of order by these parties, I will enter judgment in accordance with this Order.

[24] Pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, the *USA* action sought an order requiring the defendants to reimburse the government for all investigation and response costs incurred or to be incurred in cleaning up the Tybouts landfill. The *USA* action also sought an injunction under Section 106 of CERCLA, 42 U.S.C. § 9606, requiring the defendants to perform the remedial action selected by the EPA concerning Tybouts.

policies, is far from novel to environmental insurance coverage cases. There is substantial but a split of authority on this issue among federal and state courts, and the cases on each side of the issue appear to be in equipoise.[25]

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[25] For cases holding that cleanup costs do not constitute "damages" under standard CGL policies, see *Grisham v. Commercial Union Inc. Co.*, 927 F.2d 1039 (8th Cir. 1991) (applying Arkansas law); *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir.) (*en banc*), *cert. denied sub nom., Missouri v. Continental Ins. Cos.*, 488 U.S. 821 (1988) (applying Missouri law); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied* 484 U.S. 1008 (1988) (applying Maryland law); *Aetna Casualty & Sur. Co. v. Gulf Resources & Chem. Corp.*, No. 87-3043 (D.Idaho March 31, 1989); *Travelers Indem. Co. v. Allied Signal, Inc.*, 718 F.Supp. 1252 (D.Md. 1989); *Township of Gloucester v. Maryland Casualty Co.*, 668 F.Supp. 394 (D.N.J. 1987); *Argonaut Ins. Co. v. Atlantic Wood Indus.*, No. 87-0323-R (E.D.Va. June 20, 1988); *Travelers Ins. Co. v. Ross Elec. of Washington, Inc.*, 685 F.Supp. 742 (W.D.Wash. 1988); *Aetna Casualty & Sur. Co. v. General Dynamics Corp.*, No. 88-2220C (E.D. Mo. Jan. 23, 1991); *National Union Fire Ins. Co. of Pittsburgh, PA v. Steego Parts Corp.*, Nos. 88-0198-B, 88-0261-B (D.Me. Dec. 7, 1990); *Patrons Oxford Mutual Ins. Co. v. Marois*, Me., 573 A.2d 16 (1990); *Troy Mills, Inc. v. Aetna Casualty & Sur. Co.*, N.H. Supr., No. 89-311 (Feb. 13, 1990). For cases holding that cleanup costs are "damages" within the meaning of CGL policies, see *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2588 (1990) (applying New York law); *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188 (9th Cir. 1986); *Owens-Illinois, Inc. v. Lehigh Valley Indus., Inc.*, No. C85-7788 (N.D.Ohio Oct. 15, 1990); *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F.Supp. 1171 (N.D.Cal. 1988); *Fireman's Fund Ins. Cos. v. Ex-cell-o Corp.*, 662 F.Supp. 71 (E.D.Mich. 1987); *American Motorists Ins. Co. v. Levelor Lorentzen, Inc.*, No. 88-1994 (D.N.J. Oct. 14, 1988), *appeal dismissed*, 879 F.2d 1165 (3d Cir. 1989); *Centennial Ins. Co. v. R.R. Donnelley & Sons Co.*, C.A. No. H89-410 (N.D.Ind. Jan. 7, 1991); *Boeing Co. v. Aetna Casualty & Sur. Co.*, Wash. Supr., 784 P.2d 507 (1990); *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co.*, N.C. Supr., 388 S.E.2d 557 (1990); *AIU Ins. Co. v. FMC Corp.*, Cal., 799 P.2d 1253 (1990); *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, Ill. App. Ct., 535 N.E.2d 1071 (1989); *Aerojet-General Corp. v. San*

The issue has yet to be decided in Delaware. However, the Third Circuit applying Delaware law recently held that the term "damages" in the context of CGL policies encompasses response costs and other equitable relief. *New Castle County v. Hartford Accident and Indem. Co.*, 933 F.2d 1162, 1188 (3d Cir. 1991) amended May 29, 1991.[26] In my view, the *New Castle County* decision and the line of cases in accord therewith, *see supra* p. 32 note 25, represent the better-reasoned authority on this issue.

The court in *New Castle County* recognized that under Delaware law terms in an insurance policy are given their ordinary, usual meaning, and if a term admits of two or more reasonable interpretations, the ambiguity is to be resolved against the insurer *Id.*, slip op. at 62-3. The court further stated: "Like the district court, we think that Webster's definition of "damages" sustained—best captures the word's plain meaning. *Id.*, slip op. at 63 (citation omitted).[27] The court then acknowledged that

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Mateo County Superior Court, Cal. Ct. App., 257 Cal. Rptr. 621 (1989); *Central Illinois Pub. Serv. Co. v. Allianz Underwriters Ins. Co.*, Circuit Ct. Ill., No. 90 L 11094 (Feb. 1, 1991); *Halstead Oil Co., Inc. v. Northern Ins. Co.*, N.Y. Sup. Ct., No. 7043/90 (Dec. 10, 1990); *CPS Chem. Co. v. Continental Ins. Co.*, N.J. Super., 536 A.2d 311 (1988).

[26] This declaratory judgment action involved the same underlying actions and the same CGL policy provisions as the present case. The court specifically held that the potential monetary liability for the costs of repairing the damage to property resulting from the migration of pollutants at Tybouts constituted "damages" under the CGL policies at issue. *See id.* at 189.

[27] The district court in *New Castle County* found the legal, technical definition of "damages" to be inappropriate under Delaware law, stating the following:

> A dictionary definition of "damages" states that the word means: "the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal

the alternative, legal interpretation of the term "damages" was a reasonable construction of the term, but that the existence of such merely created an ambiguity requiring a contra-insurer construction. *Id.* The policies here at issue do not contain a definition limiting the meaning of "damages" to sum's awarded on a "legal" claim. In the absence of such a definition, the applicable rules of construction require that the term be given its plain, ordinary meaning, *see Johnston*, 303 A.2d at 679, which makes no distinction between legal and equitable liabilities. *See The Random House Dictionary of the English Language*, 365 (1973) (defining "damages" as "the estimated money equivalent for detriment or injury sustained" and as "costs" or "expense"); *Webster's Third New International Dictionary* 571 ("the estimated reparation in money for detriment or injury sustained"). *See also Boeing*, 784 P.2d at 512 ("Courts consistently agree that the 'common-sense' understanding of damages within the meaning of the policy 'includes a claim which results in causing [the policyholder] to pay sums of money because his acts or omissions affected adversely the rights of third parties . . . [i.e., the public]' ") (citation omitted)). Although the technical definition of "damages" urged by the insurers is a reasonable interpretation of the term, such merely warrants a conclusion that the term is ambiguous and therefore must be construed against the insurers. *See Hallowell*, 443 A.2d at 926.[28]

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right." Webster's Third New International Dictionary, at 571 (1971). Thus, an ordinary definition of the word "damages" makes no distinction between actions at law and actions in equity.

New Castle County v. Hartford Accident and Indem. Co., 673 F.Supp. 1359, 1365 (D.Del. 1987).

[28] AMICO argues that the term "damages" should not be given its ordinary, lay meaning because Defendant is a large manufacturing concern which procured the AMICO policies with the assistance of a nationwide insurance brokerage firm. As indicated above, see *supra* pp. 23-24, I see no reason why the established rules of con-

Having stated the above, I conclude that an action which seeks reparation in money for detriment or injury sustained is an action which seeks "damages" within the meaning of standard CGI policies. The *USA* complaint seeks to impose monetary liability for the costs of repairing property damage resulting from the migration of contaminants from Tybouts. I am therefore satisfied that the *USA* complaint seeks "damages." The fact that the monetary liability sought to be imposed in the *USA* action consists of the cost of complying with an injunction and other equitable relief, does not change this conclusion, and therefore does not relieve the insurers of their duty to defend the *USA* action.

B. *The Mitigation Provision.*

The policies issued to Defendant by Travelers and AMICO contain a provision which excludes from coverage the costs of preventive measures.[29] It is argued that

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struction regarding insurance contract interpretation should not be applied, irrespective of the size or sophistication of the insured, where the language in question is standardized policy language drafted by the insurance industry and there is no evidence that such language was negotiated. I am satisfied that the established rules of construction apply to the interpretation of the "as damages" clause as this clause consists of standard CGL policy language, and there is no evidence in the record that this language was negotiated. Indeed, the Third Circuit in *New Castle County* rejected the same argument advanced by AMICO here, stating the following:

> [We can conceive of no compelling reason why a sophisticated insured should not be entitled to a pro-coverage interpretation of a standardized ISO policy drafted by the insurance industry. As the *Boeing* Court explained: The specific language in question was not negotiated, therefore, it is irrelevant that some [insureds] have [in-house] counsel.

New Castle County, slip op. at 64-5 (quoting *Boeing Co. v. Aetna Casualty & Sur. Co.*, Wash., 784 P.2d 507, 514 (1990)). I agree with this rationale.

[29] AMICO's policies contain the following provision:

> The named insured shall promptly take at his expense all reasonable steps to prevent other bodily injury or property damage

most of the relief sought in the *USA* and the other underlying actions consists of costs for such preventive measures.[30]

In *New Castle County v. Hartford Accident & Indem. Co.*, 685 F.Supp. 1321 (D.Del. 1988), the district court held that a mitigation clause similar to the clauses here at issue precluded coverage for injunctive relief forcing the insured "to take the actions necessary to prevent the further release of contaminants from the landfill," or for "compensation for the costs incurred by the [insured] in doing the same." *Id.* at 1332.[31] Judge Latchum reasoned that such costs were "costs required to remedy those 'faults' in the landfills which lead to the release of contaminants." *Id.*[32]

> from arising out of the same or similar conditions, but such expense shall not be recoverable under this policy.

Gotschalk Aff. App. B, Ex. 14 at 4. Travelers' policies contain a similar provision:

> All expenses incurred by the insured to prevent other bodily injury or property damages from arising out of the same or similar conditions shall not be recoverable under this policy.

Drew. Aff., Ex. 1 at 005839.

[30] Since the underlying actions do not seek such relief exclusively, this argument is only relevant to the issue of the insurers' duty to indemnify, and not to the duty to defend. *See Continental Casualty*, 317 A.2d at 105 (indicating that the duty to defend arises if even one count or theory of the underlying complaint is within the coverage of the policy). Only AMICO has moved for summary judgment on the duty to indemnify issue.

[31] Judge Latchum held that the insurer was liable, however, for two other categories of costs sought in the underlying actions: (1) compensation for injury suffered by the respective plaintiffs; and (2) injunctive relief forcing the insured to cleanup the contaminants released by the landfill. *Id.*

[32] Other courts have held that there is no coverage for the cost of preventive measures, without relying on any mitigation provision, reasoning that such costs are not costs incurred "because of" property damage as required under standard CGL policies, but are costs incurred to prevent future pollution where none has yet

As the district court recognized, the *USA* action seeks injunctive relief and reimbursement for costs for both the removal of *escaped* contaminants, and for the cleanup of the landfill to prevent the *future* escape of contaminants. *Id.* The *Wagner* action seeks damages, cleanup of released leachate, and remedial efforts necessary to prevent the future escape of leachate from Tybouts. *Id.* I am satisfied that the mitigation provisions in the policies issued by AMICO and Travelers preclude coverage for the cost of measures taken or to be taken in order to prevent the further release of contaminants from Tybouts. AMICO's motion for summary judgment on the duty to indemnify, insofar as it seeks judgment that AMICO is not obligated to indemnify Defendant in the *USA* and *Wagner* actions for such costs, is therefore HEREBY GRANTED.[33]

C. *National Union's Exclusion For Cleanup Costs.*

National Union argues that it has no duty to defend the *USA* action, asserting that there is no possibility of coverage for the costs of cleanup and other remedial action sought in this action due to a provision contained in its policies excluding such costs.

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occurred. *See e.g., Aerojet-General Corp. v. San Mateo County Superior Court*, Cal. Ct. App., 211 Cal. App. 3d 216, 237 (1989); *Polaroid Corp. v. The Travelers Indem. Co.*, Mass. Super., No. 88-5207-C, slip op. at 5, Gershengom, J. (Feb. 7, 1991); *Western Pneumatic Tube Co. v. The Travelers Indem. Co.*, Wash. Super., No. 88-2-10984-2, Fox, J. (Jan. 4, 1991). *See also Boeing*, 784 P.2d at 516 ("[C]osts owing because of property damages are remedial measures taken after pollution has occurred, but preventive measures taken before pollution has occurred are not costs incurred because of property damage.").

[33] I will not determine at this time which portion of Defendant's liability under the Consent Order and Record of Decision in the *USA* action, or which portion of Defendant's potential liability in the *Wagner* action, constitutes costs for preventive measures for which there is no coverage under the policies issued by AMICO and Travelers.

The policies which National Union issued to Defendant contain two exclusions regarding pollution. One exclusion contained in paragraph N under the heading "EXCLUSIONS," is absolute in nature; excluding from coverage without exception "[t]he cost of removing, nullifying or cleaning up seeping, polluting or contaminating subsances." App. at Defendant's Motion, Ex. G at 002436 para. N(2), Ex. H at 006099 para. N(2), Ex. I at 0057819 para. N(2)[34] The other exclusion, contained in an endorsement entitled "Limitation of Coverage for Pollution," is not absolute in nature as it contains an exception providing coverage where bodily injury or property damage resulting from a "discharge" of pollutants is not "expected or intended." App. to Defendant's Motion, Ex. G at 002429, Ex. H at 0060091, Ex. I at 0057841.[35] The endorsement, however, states the following limitation:

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[34] Exclusion N, read in its entirety, excludes from coverage the following:

> 1. Bodily Injury or Property Damage arising out of the discharge, dispersal, release or escape of oil or other petroleum derivatives or substances (including oil refuse, or oil mixed with wastes) smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; whether or not sudden and accidental.
> 2. The cost of removing, nullifying or cleaning up seeping, polluting or contaminating substances.
> 3. The expenses incurred or to bodily injury, sickness, disease or death or injury to or destruction of property, including the loss of use thereof, resulting from the emission of gases, fumes, smoke, vapors or other air pollutants.
> 4. Fines, penalties, punitive or exemplary damages resulting from seepage, contamination or pollution.

Id.

[35] The exclusion contained in the endorsement is virtually, identical to the pollution exclusion contained in Travelers' policies, which is set forth above. *See supra* p. 5.

> The provisions of this endorsement do not apply with respect to operations conducted by the named insured at Mount Pleasant, Tennessee, and provided further that with respect to operations conducted by the named insured at Tarpon Springs, Florida, the provisions of this endorsement apply only with respect to pollution of any watercourse or body of water.

Id.

National Union and the Defendant advance conflicting interpretations of the two exclusions read together. National Union argues that the exclusion contained in the endorsement only affects paragraphs 1 and 3 of exclusion N pertaining to bodily injury or property damage, *see supra* note 34, so as to expand coverage for certain types of pollution otherwise absolutely excluded by paragraphs 1 and 3, except that the endorsement does not apply to pollution of any type at the Mount Pleasant, Tennessee location ("Tennessee location") or to water pollution at the Tarpon Springs, Florida location ("Florida location"). Accordingly, National Union interprets the two exclusionary provisions read together as follows. For all locations at which the insured does business, there is *no* coverage for the costs of cleaning up pollution or for fines, penalties, punitive or exemplary damages resulting from pollution. For all locations at which the insured does business, except the Tennessee location and except for the pollution of water at the Florida location, there *is* coverage for bodily injury or property damage that is caused by pollution if such is not expected or intended and not in violation of the law. At the Tennessee location, there is no coverage for bodily injury or property damage, cleanup costs, fines or penalties resulting from any type of pollution; the absolute exclusion applies since the endorsement does not apply at all to this location. At the Florida location, the absolute exclusion also applies, except for water pollution which is covered by the endorsement. Transcript of March 9, 1990 Hearing at 50-53.

The Defendant asserts that the absolute exclusion, Exclusion N, only applies to the two locations, Tennessee and Florida, which are exempted from the exclusion contained in the endorsement. Hence, the Defendant interprets National Union's policy as affording coverage where pollution-caused damage or injury is not expected or intended at all locations except the Tennessee and Florida locations, to which the absolute pollution exclusion applies.[36]

Under Delaware law, where the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning. *Hallowell*, 443 A.2d at 926. An agreement must be construed as a whole, giving effect to all provisions. *E. I. du Pont de Nemours & Co.*, Del. Supr., 498 A.2d 1108, 1113 (1988). In determining the meaning of an insurance contract, a single clause cannot be read in isolation, and every portion of the contract deserves consideration. *Cheseromi v. Nationwide Mut. Ins. Co.*, Del. Super., 402 A.2d 1215, 1217 (1979), *aff'd*, 410 A.2d 1015 (1980).

In my view, the interpretation advanced by the Defendant best captures the plain meaning of the two exclusions contained in National Union's policies read to-

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[36] In support of this interpretation, Defendant has submitted the deposition of Edward T. Lynch, of Marsh & McLennan insurance brokers. Mr. Lynch testified that it was his understanding that the underwriter of National Union's policies only intended to exclude pollution claims arising out of two locations: Mount Pleasant, Tennessee, and Tarpon Springs, Florida. *See* Affidavit of Marc S. Mayerson (Dkt. 114) Ex. A at 140-1. Mr. Lynch also testified about a letter he sent to National Union's counsel in July in 1985 which states Mr. Lynch's interpretation of the National Union policies. The letter states: "The intent was clear to all parties. Pollution was covered subject to the terms of the endorsement entitled 'Limitation of Coverage for Pollution' with the exception of the two referenced locations. Those two referenced locations were subject to Exclusion N within the basic policy form." Letter to Robert A. Zeavin from Edward T. Lynch dated July 26, 1985 at 2, *Id.*, Ex. A.

gether. I am therefore satisfied that National Union's policies afford coverage for pollution in accordance with the terms of the "non-absolute" exclusion contained in the endorsement at all of the insured's locations except the Tennessee and Florida locations, to which the "absolute" exclusion—Exclusion N—applies. An interpretation of the two provisions which limits application of the endorsement to only two paragraphs of the "absolute" exclusion contained in the basic policy form, absent any such indication in the endorsement, is in my view an unreasonable interpretation. However, even were I to conclude that the interpretation advanced by National Union is reasonable, such would merely warrant a conclusion that the policy language is ambiguous and therefore subject to a construction in favor of the insured and against the insurer. *See Hallowell*, 443 A.2d at 926.

Having stated the above, I conclude that the "absolute" exclusion in National Union's policies which, *inter alia*, excludes cleanup costs does not apply to the Tybouts location, and therefore the fact that the *USA* action seeks such costs does not relieve National Union of its duty to defend this action.

6. *POLLUTION EXCLUSION.*

The insurers contend that since the actions of Defendant fall within the terms of the pollution exclusion in the CGL policies issued to Defendant, it has no duty to defend in the underlying suits. Defendant, on the other hand, argues that its actions do not fall within the pollution exclusion language of the policies and therefore the insurers do have a duty to defend. I have already ruled that an insurer has a duty to defend when the allegations of the underlying complaint show a potential that liability within coverage will be established.[37]

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[37] *See supra* pp. 14-21 and accompanying discussion. *See also Villa Charlotte Cronte, Inc.*, N.Y. Ct. App., 476 N.E.2d at 641 (insurer excused from its duty to defend only if it can be deter-

The pollution exclusion in Travelers and National Union's policies with Defendant provides:

> It is agreed that this insurance does not apply:
>
> (a) to bodily injury or property damage arising out of any emission, discharge, seepage, release or escape of any liquid, solid, gaseous or thermal waste or pollutant.
>
> (1) if such emission, discharge, seepage, release or escape is either expected or intended from the standpoint of any insured or any person or organization for whose acts or omissions any insured is liable, or
>
> (2) resulting from or contributed to by any condition in violation of or non-compliance with any governmental rule, regulation or law applicable thereto. . . .[38]

A. *"Expected or Intended"*.

An analysis of the insurers' duty to defend under Section (a)(1) of the pollution exclusion clause must necessarily begin with a definition of "expected or intended". This language has previously been discussed by Judge Latchum in *New Castle County v. Continental Casualty Company*, 725 F.Supp. 800 (D.Del. 1989). In *New Castle County*, the court found the definitions of "expected" and "substantial probability" to be indistinguishable. *Id.* at 813.[39] *See also County of Broome v. Aetna Casualty and*

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mined as a matter of law that there is no factual or legal basis upon which the insurer might eventually be obligated to indemnify the insured.)

[38] *See* Drew. Aff., Ex. 1 at 005848; App. to Defendant's Motion Ex. G at 002423; *See* n.5 *supra* for AMICO's position on the pollution exclusion clause in its policy with Stauffer.

[39] Although the Third Circuit disagreed with the District Court's failure to distinguish the occurrence definition and the "expected or intended" exclusion, *see supra* n.40. The court did not disagree with the District Court's definition of expected. *See New Castle County v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162, 1203 (3d Cir. 1991).

Surety Co., 540 N.Y.S.2d 620 (A.D.3 Dept. 1989) ("property damages are expected if the actor knew or should have known there was a substantial probability that a certain result would take place); 7A Appleman's Insurance Law and Practice, § 4492.02 at 29 ("The word 'intent' for purposes of tort law and for purposes of exclusionary clauses in insurance policies denotes that the actor desires to cause the consequences of his act or believes that consequences are substantially certain to result from it. In order for an act to be intentional, its consequences must be substantially certain to result as opposed to the feature of wanton acts that the consequences be only probably certain to result; thus, a normal actor's conduct loses the character of intent and becomes mere recklessness."); *Farmer in the Dell Ent. v. Farmers Mutual Ins.*, Del. Supr., 514 A.2d 1097, 1100 (1986) ("Where the tort feasor clearly lacks the intent to inflict any damage or injury and it is not foreseeable that damage will occur the exclusion will not apply").

I am persuaded that the definition of "expected or intended" should be no different in the case *sub judice*. Thus, under the pollution exclusion clause I conclude that the insurers have no duty to defend if from the allegations in the complaint I can determine that there was a substantial probability that Defendant intended to discharge a pollutant.[40] The insurers have a duty to defend even if only one count or theory of the underlying complaint is potentially within the coverage afford by the policies. *Continental Casualty Co. v. A.I. du Pont School Dist.*, 317 A.2d at 105. The question then becomes, do the allegations in the underlying complaints state

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[40] While the Third Circuit found that the "expected or intended" language within the occurrence definition dealt with whether the insured "expected or intended" the damage, the court determined that under the pollution exclusion, the "expected or intended" language refers only to discharge. *See New Castle County v. Harford Acc. & Indem. Co.*, 933 F.2d 1162, 1203 (3d Cir. 1991).

whether the Defendant expected or intended to discharge a pollutant into or upon the land or any watercourse or body of water. *See New Castle County v. Hartford, et al.*, No. 85-436-JLL, slip op. at 14 (D.Del. November 4, 1991); *See also Continental Casualty*, 317 A.2d 101, 105 (if even one count or theory of plaintiff's complaint lies within the coverage of the policy, the duty to defend arises); *Villa Charlotte Cronte, Inc.*, 476 N.E.2d 640, 641 (an insurer is excused from its duty to defend only if it can be determined as a matter of law that there is no possible factual or legal basis upon which the insurer might eventually be obligated to indemnify the insured).[41]

The *Wagner* complaint alleges, *inter alia*, that the "defendants *negligently* released . . . contaminants into plaintiff's drinking water and/or surrounding water system." *See Wagner* complaint, App. to defendant's motion, Ex. K para. 34. The complaint goes on to assert the grounds for defendant's alleged negligence. *Id.*, para. 35. The specific allegations of negligence indicate a potential for coverage and therefore militate against a conclusion as a matter of law that Stauffer's expected or intended to discharge a pollutant. *See Continental Casualty Co.*, 317 A.2d at 105 ("[I]f even one count or theory of plaintiff's complaint lies within the coverage of the policy, the duty to defend arises."); *Jackson TP, ETC. v. Hartford Acc. & Indem.*, N.J. Super., L., 451 A.2d 990, 995 (1982) ("The fact that there are claims against the insured alleging intentional and willful actions does not excuse the carriers from their duty. If the claims are mixed or based

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[41] It should be noted that while the District Court in *New Castle County* considered facts outside the complaint, it was dealing with both the duty to defend and the duty to indemnify. The present case is only in the summary judgment stage of the duty to defend. Nevertheless, the same inquiry is applicable with the exception that it is limited to the allegations in the underlying complaint. *Cf. Avondale v. The Travelers Indemnity Co.*, 697 F.Supp. 1314 (S.D.N.Y. 1988).

on conflicting theories, one which requires coverage and one which does not, the carrier has no choice, it must defend.").

The *USA* complaint is unlike the *Wagner* complaint in that it does not contain any allegations of negligence, nevertheless it does not contain any language which would axiomatically preclude a possibility for coverage under the policies. The *USA* complaint alleges, *inter alia*, that Defendant disposed of waste at the landfill from its production of polyvinyl chloride (PVC). *See USA* complaint, para. 21. It further alleges that wastes disposed of by defendants "is creating a leachate that is percolating downward through the soil and is entering the underlying groundwater." *Id.* para. 28. Although Defendant may have disposed of its wastes at the landfill, the allegations do not indicate that Defendant, through its actions, intentionally polluted.[42] In my view, the *USA* complaint simply does not demonstrate that Stauffer expected or intended to discharge a pollutant into or upon

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[42] *Cf. Avondale Industries v. The Travelers Indemnity Co.*, 697 F.Supp. 1314, 1317 (S.D.N.Y. 1988) ("[t]here are no allegations as to how the waste escaped or seeped, nor as to Avondale's culpable actions that contributed to the occurrence. While Avondale may have continuously generated these waste products, it does not follow necessarily, and the private actions certainly have not alleged, that Avondale continuously, by its own actions or through the actions of an agent, intentionally polluted.") As the court in *Avondale*, noted "the defendants' assertion that Avondale was an active, continuous polluter is a conclusion that is not established in the underlying pleadings. The matter outside the pleadings submitted by the defendant is irrelevant to the determination of its duty to defend; such matter is relevant only to its duty to indemnify. *Id.* at 1317. *But see EAD Metallurgical, Inc. v. Aetna Casualty & Surety Co.*, 701 F.Supp. 399, (W.D.N.Y. 1988) (*insured* allegedly arranged for disposal of certain wastes into the Town's sewer system); *Technicon Electronics Corp. v. American Home Assurance Co.*, 542 N.E.2d 1048, 1049, (N.Y. 1989) (where the insured admitted that it had intentionally discharged production wastes into a nearby waterway).

the land or any watercourse or body of water; it cannot be concluded from the complaint that such consequences were substantially probable to occur. *See New Castle County v. Hartford*, No. 85-436-JLL (D.Del. Nov. 4, 1991); *Continental Casualty*, 317 A.2d 101; *Villa Charlotte Cronte, Inc.*, 476 N.E.2d 640.

B. *Violation of Law.*

The insurers contend that they should be relieved of their duty to defend since certain actions of Defendant constituted violations of law.

In this regard, the *Wagner* complaint alleges in a conclusory fashion that the defendants negligently:

> (b) Fail[ed] to obtain a permit from the State of Delaware Secretary of the Department of National Resources and Environmental Control in violation of the requirements of 7 *Del.C.* § 6003(a)(2).[43]

Upon examination of the allegations contained in the complaint, it appears that there are no allegations in the complaint speaking to whether there is even any obligation on the part of Stauffer as a user of a landfill, as opposed to the owner of the landfill, namely New Castle County, to apply for a § 6003 permit. Further, even assuming an allegation was made and such an obligation existed, there are absolutely no allegations in the complaint specifying how Defendant negligently violated the statute. Absent same, I cannot conclude as a matter of law that the Defendant acted negligently as opposed to

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[43] 7 *Del.C.* § 6003(a)(2) provides:

> (a) No person shall, without first having obtained a permit from the Secretary, undertake any activity: . . .
>
> (2) In a way which may cause or contribute to discharge of a pollutant into any surface or ground water;

The statutory scheme at 7 *Del.C.* § 6013 provides for criminal penalties for any willful or negligent violations of § 6003.

acting inadvertently, and therefore cannot conclude that the exclusion applies.

Once again, I reiterate that the developed factual record which clutter these papers are outside of the pleadings and are therefore simply not relevant to a determination of the duty to defend. *See supra*, pp. 14-21.

Having stated the above, the insurer's Motion for Summary Judgment as to the *USA* and *Wagner* actions based on the pollution exclusion clause is HEREBY DENIED.

7. *KNOWN LOSS.*

The insurers next contend that there is no duty to defend since they claim that the losses giving rise to the underlying actions were not fortuitous in that they were "known losses" and therefore not insurable risks.

The fortuity doctrine arises from the basic tenet that insurance covers risks rather than losses that were planned, intended or anticipated by the insured. *Intermetal Mexicana, S.A. v. Ins. Co. of North America*, 866 F.2d 71 (3d Cir. 1989).[44] Thus, a "known loss" is one which is substantially probable to occur. *New Castle County v. Hartford Acc. & Indem. Co.*, 685 F.Supp 1321, 1330 (D.Del. 1988). A known loss is one that focuses on damages. *See New Castle County v. Hartford*, 685 F.Supp. at 1330. The inquiry becomes, do the allegations of the complaint establish as a matter of law that Stauffer knew with substantial probability that a loss would occur at the time of the inception of the policies at issue?

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[44] "A fortuitous event . . . is an event which *so far as the parties to the contract are aware,* is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, such as the loss of a vessel, *provided that the fact is unknown to the parties.*" *Compagnie Des Bauxites v. Ins. Co. of North America*, 724 F.2d 369, 372 (3d Cir. 1983) (adopting the definition of a fortuitous event found in Restatement of Contracts § 291 comments a (1932)).

I am satisfied that the answer is in the negative since I cannot conclude from the allegations in the *USA* and *Wagner* complaints that a loss was substantially probable to occur.

The *USA* complaint alleges that Stauffer discarded or disposed of its waste at Tybouts Corner from its production of polyvinyl chloride (PVC). *See USA* complaint para. 21. The complaint goes on to state the various chemicals found in PVC and in the leachate percolating downward into the groundwater. *See USA* complaint para. 28-30. Some of these chemicals are alleged to have been "known carcinogens".[45] What the complaint does not state however, is when these "known carcinogens" became "known".[46] More importantly, the complaint does not contain facts indicating that Stauffer knew that its waste contained "known carcinogens" or that Stauffer knew that its waste would percolate down through the soil into the groundwater.[47]

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[45] The *Wagner* complaint contains many of the same allegations with respect to these chemicals and Stauffer's actions.

[46] This factor is significant in light of the District Court's conclusion that the parties' understanding of the term "contaminant" was *determined* by what was recognized as a contaminant at the time the contract was made. *New Castle County v. Hartford Acc. & Indem. Co.* C.A. No. 85-436-JLL, slip op. at 17, (D.Del. Nov. 4, 1991). The court noted that "the risk that a certain substance will be discovered to be a pollutant is not reasonably foreseeable, it is not the kind of risk that is normally understood to be placed on the insured. *Id.* Although the court in *New Castle County* considered facts outside the complaint in resolving this issue, that case as I have noted hereinabove, involved the duty to defend and indemnify, here we are concerned with the duty to defend, therefore we are limited to the allegations in the complaint.

[47] With respect to the known loss issue, Travelers points to an admission by Defendant that it was aware in 1969 or 1970 of an odor emanating from its waste at the landfill. (Dkt. #104, p. 17). However, knowledge of an odor does not impute to Defendant knowledge of a loss within the context of the policies at issue. In any event, this argument relies on matters outside the com-

The claims in both complaints that the Wagner well was allegedly contaminated as early as 1974 also does not as a matter of law lead to the conclusion that Stauffer knew of this loss or that such loss was likely to occur as of this date. *See USA* complaint paras. 29, 31; *Wagner* complaint, paras. 21, 22, 23. The complaints do not say that Stauffer was aware of such contamination nor does it assert its role in the matter.

Assuming arguendo, that Stauffer was aware of potential risks at the time it procured its policies with the insurers, "knowledge of a risk is not the same as knowledge of a loss." *Liberty Mutual Ins. Co. v. SCA Services, Inc. & Others*, Mass. Super., C.A. No. 88-6575, slip op. at 7 (Oct. 12, 1989) ("although SCA may well have known . . . that chemicals were leaking from the landfill it does not know to this day that it will be liable for the resultant damage."); *see also City of Johnstown, N.Y. v. Bankers Standard Ins.*, 877 F.2d 1146, 1152-53 (2d Cir. 1989) (applying New York law, the court found that knowledge of a risk does not make that risk insurable). The best that can be said in support of the insurers' respective positions, is that defendant may have been aware of the risks involved at the landfill but as the *Liberty Mutual* and *City of Johnstown* cases illustrate, such knowledge is not the same as a known loss. *See also Compagnie Des Bauxites v. Ins. Co. of North America*, 724 F.2d 369, 372 (3d Cir. 1983) ("We . . . disagree with the district court's definition of fortuitousness because

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plaints, and although such may later serve as a basis for finding the insurers do not have a duty to indemnify I decline to consider such in determining the duty to defend.

National Union asserts that as the *USA* and *Wagner* complaints identify alleged damage in 1974 and its policies with defendant did not begin until 1977, losses were known by defendant prior to the policies inception. (Dkt. #99, p. 12). But the complaints do not indicate that the alleged damage in 1974 was caused by the defendant's waste or even that defendant had knowledge of the damage.

the court determined what was 'certain' based on knowledge gained through hindsight. . . . We think it inappropriate to cause the insured to suffer a forfeiture by concluding, with the aid of hindsight, that no fortuitous loss occurred, when at the time the insurance took effect only a risk was involved as far as the parties were aware."). There is nothing in the pleadings which suggest that it is plausible that Stauffer was aware of such *losses* before the underlying complaints were actually filed.

Having stated the above, I conclude that the insurers are not relieved of their duty to defend on the basis that such losses were known to Defendant at the inception of the policies at issue.[48] The application in this regard is therefore HEREBY DENIED.

8. *TRIGGER.*

The final issue to be resolved is when the insurance policies were triggered. The policies required that property damage must occur during the policy period.[49] I am persuaded by the continuous trigger analysis adopted by Judge Latchum in *New Castle County v. Continental Casualty Co.* (CNA) E25 F. Supp. 800, 809-812 (D.Del. 1989). In *New Castle County*, the court noted "the 'somewhat parallel' nature of a disease that inflicts progressive bodily injury and the slow leaching of pollutants from a landfill to adjacent properties. . ." *Id.* at 809.[50] The court found that the "continuing damage" caused by the gradual spread of leachate from the Ty-

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[48] My conclusion in this regard compels me to reject the insurers arguments that Stauffer as a matter of law concealed or misrepresented facts in its applications for insurance.

[49] For purposes of damages in this case I am only speaking to property damage, not bodily injury although coverage for such injuries is provided for in the policies.

[50] For initial guidance on this issue, the Court looked to an earlier case *AC&S, Inc. v. Aetna Casualty & Surety Co.*, 764 F.2d 968 (3d Cir. 1985) which involved a claim by individuals exposed to insulation which contained asbestos. *Id.* at 809.

bouts Corner landfill supports the analogy to the development of an insidious disease such as asbestosis. *Id.* at 813. Further, the court concluded that "the term property damage does not indicate at what point in time the gradual leaching of contaminants from a landfill would trigger the policy." *Id.* at 810, Thus, "any part of a single injurious process" would trigger coverage. *Id.*

In the present case, the *Wagner* and *USA* complaints both allege that Stauffer discarded its waste at the landfill from 1969 to 1971. *See Wagner* complaint, para. 17; *USA* complaint, para. 21. In addition, both complaints allege that the damages which have occurred, will continue to do so in the future.[51] *See, e.g., Wagner* complaint, para. 26, 30; *USA* complaint, paras. 1, 39. Thus, the possibility exists that the "damage" which allegedly started in 1969, exists presently and will continue to occur. As such, under the "continuous trigger" analysis which I choose to adopt in the matter *sub judice*, every policy from the start of the injurious process is triggered. *See New Castle County v. CNA*, 725 F.Supp. at 813. I am therefore satisfied that each of the insurers' policies with defendant were triggered during their policy periods.

Having stated the above, Defendant's Motion for Partial Summary Judgment on the issue of trigger is HEREBY GRANTED.

IT IS SO ORDERED.

/s/ Vincent J. Poppiti
VINCENT J. POPPITI
Judge

VJP/tap

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[51] Property damage is defined in the policies as "injury to or destruction of tangible property." Defendants' Motion for Partial Summary Judgment on the plaintiff-insurers' duty to defend. (Dkt. #77, p. 19). However, the policies do not speak to what triggers the type of damage which allegedly occurred in the case *sub judice* —i.e., a slow leaching of pollutants.

Supreme Court, U.S.
FILED
MAR 19 1993
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No. 92-1367

In The

Supreme Court of the United States

October Term, 1992

NEW CASTLE COUNTY,

Petitioner,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut Corporation, et al.,

Defendants,

and

CONTINENTAL CASUALTY COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

1. Whether the failure of the Court of Appeals to mention an inapposite state trial court decision creates a conflict between the circuits or within the Third Circuit regarding the scope of *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940).

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No. 92-1367

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HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut Corporation, et al.,

Defendants,

and

CONTINENTAL CASUALTY COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Continental Casualty Company ("CNA")[1] respectfully requests that this Court deny the petition of New Castle County (the "County") for a writ

[1] Pursuant to Supreme Court Rule 29.1, respondent represents that CNA Financial Corporation is respondent's parent and that Agency Management Services, Inc. is a non-wholly owned subsidiary of respondent.

of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in *New Castle County v. Hartford Accident and Indem. Co.*, 970 F.2d 1267 (3d Cir. 1992) ("*New Castle VII*").

COUNTERSTATEMENT OF THE CASE

In *New Castle VII*, the United States Court of Appeals for the Third Circuit reversed and remanded an earlier decision of the United States District Court for the District of Delaware with instructions to enter judgment for CNA. *New Castle VII*, 970 F.2d at 1268. At the conclusion of its opinion, the Court of Appeals declared that "the well of issues in this case, as deep as it may have been, has finally run dry and this seven year insurance litigation ends." *Id.* at 1273. In expressing this view with certitude, the Court of Appeals assumed that this environmental insurance coverage dispute involving, as it does, garden variety state law issues presented no issue for further review.

Unfortunately, the Court of Appeals underestimated the County's interest in prolonging this litigation. To this end, the County has now gone so far as to seize upon utterly irrelevant language in a footnote to a state trial court decision in order to claim (falsely) that there is a conflict between the circuits and, indeed, within the Third Circuit. As discussed below, the County's petition presents no legal question at all, and satisfies none of the "special and important reasons" customarily considered by this Court for granting certiorari.

A. The Original Proceedings In The District Court

This case began in 1985 as a consolidated declaratory judgment action concerning the duty of twelve insurance companies, including CNA, to indemnify and defend the County in connection with claims asserted in four underlying lawsuits arising out of groundwater pollution caused by County landfills at Tybouts Corner ("Tybouts") and Llangollen in Delaware.

Following a seven-day non-jury trial, the district court, on October 23, 1989, issued an order and opinion, *New Castle County v. Continental Casualty Co.*, 725 F. Supp. 800 (D. Del. 1989) ("*New Castle III*"), imposing upon CNA (the only defendant not to settle before trial) the duty to indemnify and defend the County in the three underlying suits relating to Tybouts. In *New Castle III*, the district court found that the occurrence clause[2] and the pollution exclusion clause[3] in

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[2] CNA's policies provide coverage only for damages caused by an "occurrence." An "occurrence" is defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *New Castle County v. Hartford Accident and Indem. Co.*, 685 F. Supp. 1321, 1329 (D. Del. 1988) ("*New Castle II*").

[3] The pollution exclusion clause in CNA's policies forecloses coverage for "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental." *New Castle County v. Hartford Accident and Indem. Co.*, 673 F. Supp. 1359, 1362 n.4 (D. Del. 1987) ("*New Castle I*").

CNA's policies were coextensive and that the only issue was whether the County expected the damage allegedly caused by Tybouts. *Id.* at 813. Finding that the County did not expect such damage, the district court entered judgment for the County. *Id.* at 820. CNA then filed its first appeal to the Third Circuit.

B. The First Appeal

In *New Castle County v. Hartford Accident and Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991) ("*New Castle V*"), the Court of Appeals reversed the decision of the district court with respect to the pollution exclusion clause. Specifically, the Court drew a sharp distinction between the occurrence clause and the pollution exclusion clause, holding that "the 'occurrence' clause focuses on *damages*, whereas the pollution exclusion clause focuses on *discharges*." *Id.* at 1199 (emphasis in original). Because the district court had erroneously treated the two clauses as one and the same, it had never considered whether the County expected Tybouts to discharge contaminants. Accordingly, the Third Circuit remanded the case to the district court to determine "whether the County expected Tybouts Corner landfill to discharge or release contaminants." *Id.* at 1207. The Court observed that "this shift of focus from damage to discharge may change the outcome of this case." *Id.* at 1169.

C. The Proceedings On Remand

On remand, the County did not dispute that the County expected Tybouts to discharge "leachate" before CNA issued its policies, or that leachate is, in fact, a "contaminant." *New Castle VII*, 970 F.2d at 1269. Rather, the County argued – for the first time in the seven year history of the case – that the pollution exclusion clause in CNA's policies does not bar coverage because the County did not know leachate was a contaminant when it purchased CNA's policies.

In its opinion, the district court found that the County expected the discharge of leachate and that leachate is a contaminant. *New Castle County v. Hartford Accident and Indem. Co.*, 778 F. Supp. 812, 816-17 (D. Del. 1991) ("*New Castle VI*"). Although these two findings were dispositive of the issues posed by the Third Circuit and should have ended the case, the district court held that the pollution exclusion clause was nonetheless inapplicable because the County allegedly did not know that leachate was a contaminant when it contracted with CNA. Relying on this so-called "known contaminant" theory, the district court again entered judgment for the County. Another appeal ensued.

D. The Second Appeal

The issue considered by the Third Circuit on the second appeal was narrowly framed:

> The sole issue we need to address is whether the term "contaminants" in the pollution exclusion clause is plain and unambiguous, or whether it

> can be reasonably construed to contain a scienter element, that is, read so that the clause excludes coverage only if the insured discharges what is known to be a contaminant.

New Castle VII, 970 F.2d at 1270. The Third Circuit resolved the issue in favor of CNA:

> We hold that the term is plain and unambiguous under Delaware law and when a polluter discharges contaminants, whether or not he knows them to be contaminants, coverage is excluded under the insurance policy. We will reverse and remand with instructions to enter a judgment for [CNA].

Id. at 1268.[4] The County then filed a petition for rehearing, which was denied.

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[4] While rejecting the "known contaminant" theory on the merits, the Third Circuit also rebuked the County for failing to raise the issue earlier:

> [The County] waited five years, when it was at the brink of losing, before bringing this issue . . . . While we choose not to decide the waiver issue, this kind of eleventh hour concoction undermines judicial economy as well as the responsible (or irresponsible) litigant's credibility with the court, irrespective of the rules of waiver that may or may not be applicable in these circumstances. Litigants are admonished to refrain from this kind of careless or dilatory practice.

Id. at 1270 n.1. One need look no further than the instant petition – another "eleventh hour concoction" injected into the litigation when the County "was at the brink of losing" – to appreciate the County's disregard for the Third Circuit's admonition.

SUMMARY OF ARGUMENT

In what can only be characterized as a bizarre flight of fancy, the County states in its petition filed with the Court that:

> [t]his diversity case presents an important and far-reaching issue which has given rise to a conflict among the United States Circuit Courts of Appeals, and a conflict within the Third Circuit, and which has never been addressed by this Court. That issue is whether a federal court sitting in diversity may, under *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940) ("*West*"), and *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940) ("*Fidelity Union*"), completely ignore a highly pertinent state court decision, simply because that decision is interlocutory, when predicting how the highest state court would rule.

(County's Petition for Writ of Certiorari ("County's Pet."), p. 11.) In fact, all circuits, including the Third Circuit, have uniformly followed *West* and *Fidelity Union*. And, the "highly pertinent" decision to which the County alludes is a state trial court decision that did not even consider, much less decide, the issue before the Court of Appeals in *New Castle VII. National Union Fire Ins. Co. v. Rhone-Poulenc Basic Chems. Co.*, No. 87C-SE-11 (Del. Super. Ct. Jan. 16, 1992) ("*Rhone-Poulenc*").

ARGUMENT

THE FAILURE OF THE COURT OF APPEALS TO MENTION AN INAPPOSITE STATE TRIAL COURT DECISION DOES NOT CREATE A CONFLICT BETWEEN THE CIRCUITS OR WITHIN THE THIRD CIRCUIT

In *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940), this Court held that a lower state court decision is "datum for ascertaining state law" that should not be disregarded by a federal court unless there is "other persuasive data that the highest court of the state would decide otherwise." *Accord Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940). The courts of appeals have uniformly followed *West* and *Fidelity Union*.[5] And, as the cases cited by the County demonstrate, the courts of appeals, including the Third Circuit, have consistently applied *West* and *Fidelity Union* even when the state court decision in question was interlocutory or on appeal. *See Hamme v. Dreis & Krump Mfg. Co.*, 716 F.2d 152 (3d Cir. 1983); *Williams v.*

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[5] *See, e.g., McCoy v. Providence Journal Co.*, 190 F.2d 760, 765 (1st Cir.), *cert. denied*, 342 U.S. 894 (1951); *Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79, 84 (2d Cir. 1991); *Northern Ins. Co. of N.Y. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 193 (3d Cir. 1991); *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 957 F.2d 1153, 1156 (4th Cir.), *cert. denied*, 113 S. Ct. 78 (1992); *Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992); *FL Aerospace v. Aetna Casualty & Sur. Co.*, 897 F.2d 214, 218-19 (6th Cir.), *cert. denied*, 111 S. Ct. 284 (1990); *Peeler v. Village of Kingston Mines*, 862 F.2d 135, 137 (7th Cir. 1988); *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 826 (8th Cir. 1983); *Meusy v. Montgomery Ward Life Ins. Co.*, 943 F.2d 1097, 1099 (9th Cir. 1991); *Lowell Staats Mining Co. v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1269 (10th Cir. 1989); *Watson v. Dugger*, 945 F.2d 367, 369-70 (11th Cir. 1991); and *Herzog v. Colpoys*, 143 F.2d 137, 138 (D.C. Cir. 1944).

First Fed. Sav. & Loan Ass'n, 651 F.2d 910 (4th Cir. 1981); *Giguere v. United States Steel Corp.*, 262 F.2d 189 (7th Cir.), *cert. denied*, 360 U.S. 934 (1959).[6]

Notwithstanding this uniform authority, the County, relying solely on the failure of the Third Circuit in this case to mention the decision of the Delaware trial court in *Rhone-Poulenc*, contends that a conflict exists on this issue between the circuits and within the Third Circuit. In making this nonsensical argument, the County arrogantly presumes that the Third Circuit "completely ignored" *Rhone-Poulenc* "simply because that decision is interlocutory." (County's Pet., p. 11.) In fact, there is a far more basic explanation – the case had nothing whatsoever to do with the issue before the Third Circuit. (Moreover, we know of no authority requiring a federal court to mention in an opinion every decision it has considered.)

As even the County must acknowledge, the applicability of *West* and *Fidelity Union* is conditioned on the existence of a "relevant" state court decision. (County's Pet., p. 11.) *See, e.g., Hamme v. Dreis & Krump Mfg. Co.*, 716 F.2d at 154 (following decision of intermediate state court that resolved "the same question"); *Williams v. First Fed. Sav. & Loan Ass'n*, 651 F.2d at 927 n.37 (following "precise holding" of lower state court that was "squarely on point"); and *Giguere v. United States Steel Corp.*, 262 F.2d at 193 (following intermediate state court decision that had addressed the "precise issue").

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[6] Indeed, the Third Circuit in this case followed an interlocutory state court decision. *New Castle V*, 933 F.2d at 1196 (following *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, No. 89C-AU-99, 1990 WL 14200 (Del. Super. Ct. Sept. 19, 1990)).

Here, the decision of the trial court in *Rhone-Poulenc* does not satisfy this condition. Indeed, the decision never addressed, let alone resolved, the "precise issue" before the Third Circuit in *New Castle VII* – whether the term "contaminant" within the meaning of the pollution exclusion clause carries a scienter requirement.

In *Rhone-Poulenc*, the trial court considered various defenses raised by insurers on motions for summary judgment, including defenses based on the pollution exclusion clause and the "known loss" doctrine. In addressing the pollution exclusion clause (the only provision at issue in *New Castle VII*), the court in *Rhone-Poulenc* made no mention of the "known contaminant" theory espoused by the district court in *New Castle VI*. (County's Pet., pp. 83a-89a.)[7] The only reference to the theory occurs in a footnote in the context of the *Rhone-Poulenc* court's discussion of the "known loss" doctrine, which involves entirely different considerations than the pollution exclusion clause.[8] (County's Pet., p. 90a n.46.) For the

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[7] As used herein, "(County's Pet., p. ___a)" refers to a page from the unpublished *Rhone-Poulenc* opinion included in the appendix to the County's certiorari petition.

[8] As the court in *Rhone-Poulenc* noted, the "known loss" doctrine precludes insurance coverage if the insured "knew with substantial probability that a loss would occur at the time of the inception of the policies at issue." (County's Pet., p. 89a.) Stated differently, the "known loss" inquiry "focuses on damages." *Id.* The insured's knowledge of whether a discharged substance is a contaminant is plainly relevant in determining the insured's expectation that the substance will cause damage. It is hardly surprising, therefore, that, in deciding the applicability of the known loss doctrine, the court in *Rhone-Poulenc* considered whether the insured in that case knew that it was

County to contend in these circumstances that the court in *Rhone-Poulenc* "adopted" the holding of the district court in *New Castle VI* (County's Pet., p. 10), or that the Third Circuit was in any way bound to discuss *Rhone-Poulenc*, is disingenuous in the extreme.[9]

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discharging a contaminant before it contracted for insurance. At no time, though, did the court in *Rhone-Poulenc* hold that the insured's knowledge of whether a substance is a contaminant has any bearing on the applicability of the pollution exclusion clause, the "precise issue" before the Third Circuit in *New Castle VII*.

[9] Lest there be any doubt about the inapplicability of *Rhone-Poulenc*, the Honorable James L. Latchum, whose adoption of the "known contaminant" theory in *New Castle VI* was reversed by the Third Circuit, recently had occasion to revisit the issue in the wake of *New Castle VII* and *Rhone-Poulenc*. In *Remington Arms Co. v. Liberty Mut. Ins. Co.*, No. 89-420-JLL, 1992 U.S. Dist. LEXIS 20354 (D. Del. Dec. 23, 1992) (applying Connecticut law), Judge Latchum, looking to Delaware law in the absence of Connecticut authority, rejected the "known contaminant" theory advanced by the insured. In so doing, Judge Latchum followed the Third Circuit's decision in *New Castle VII* without ever mentioning *Rhone-Poulenc* and, indeed, observed that *New Castle VII* was decided "in the absence of any Delaware case law or statutory law on [the "known contaminant" theory]." *Remington*, 1992 U.S. Dist. LEXIS 20354 at *12.

CONCLUSION

For the foregoing reasons, CNA respectfully requests that the Court deny the County's petition for writ of certiorari.

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No. 92-1367

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NEW CASTLE COUNTY,
Petitioner,
v.
HARTFORD ACCIDENT AND INDEMNITY COMPANY,
a Connecticut Corporation, *et al.*,
Defendants,
and
CONTINENTAL CASUALTY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

In Respondent Continental Casualty Company's ("CNA's") March 19, 1993 Brief in Opposition ("CNA Opp."), CNA agrees that federal courts sitting in diversity jurisdiction, including the Third Circuit in this case, must follow the decisions of this Court in *West* and *Fidelity Union*. CNA Opp. at 8.[1] CNA nonetheless attempts to avoid this Court's scrutiny of the decision below by trying to twist the issue presented in New Castle County's ("the County's") petition for writ of *certiorari*

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[1] *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940) ("*West*"); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940) ("*Fidelity Union*").

into one of state law, and by mischaracterizing the rulings in *West* and *Fidelity Union*.

The issue is not, as CNA contends, whether the Delaware state court decision in *Rhone-Poulenc* [2] is controlling in this case. CNA Opp. at 9-10. Rather, the issue which the County asks this Court to review is whether a federal court of appeals, sitting in diversity, is bound by *West* and *Fidelity Union* to consider an interlocutory decision of a lower state court, which cites with approval the decision under review, in the absence of any other indicia of the applicable state's law. CNA's assumption that only "controlling" decisions need be considered merely repeats the error committed by the Third Circuit. This Court should provide guidance on this issue because different circuits have treated interlocutory lower state court decisions in conflicting fashions. *See* discussion and cases cited at pp. 16-19 of the County's petition.

Furthermore, there is no basis for CNA's assertion that the Third Circuit implicitly considered *Rhone-Poulenc* in *New Castle VII* [3] and limited it to the particular facts and the issues resolved therein. CNA Opp. at 9. In fact, there is no evidence whatsoever that the Third Circuit did anything other than ignore *Rhone-Poulenc*.

Finally, even if the Third Circuit in *New Castle VII* explicitly had taken the position CNA now advocates, that position violates the holdings of *West* and *Fidelity Union*. The *Rhone-Poulenc* court's approval of *New Castle VI* [4] was the sole existing indicia of state law on point when the Third Circuit was deciding *New Castle*

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[2] *National Union Fire Ins. Co. v. Rhone-Poulenc Basic Chems. Co.*, No. 87C-SE-11 (Del. Super. Jan. 16, 1992) ("*Rhone-Poulenc*"), a copy of which is reprinted in the appendix to the County's petition for writ of *certiorari* ("the County's petition") at 46a-93a.

[3] *New Castle County v. Hartford Accident & Indem. Co.*, 970 F.2d 1267 (3d Cir. 1992) ("*New Castle VII*").

[4] *New Castle County v. Hartford Accident & Indem. Co.*, 778 F. Supp. 812 (D. Del. 1991) ("*New Castle VI*").

VII, and, in the absence of any indication that the Delaware Supreme Court would rule to the contrary, the Third Circuit was obligated to follow *Rhone-Poulenc*. *See West*, 311 U.S. at 237; *Fidelity Union*, 311 U.S. at 177-79.

Even assuming that CNA's argument that *Rhone-Poulenc* is not squarely controlling were correct, the Third Circuit still would have been obligated to consider the *Rhone-Poulenc* decision, and apply it by approving *New Castle VI*, in the absence of any contrary indicia of state law. CNA does not dispute the facts that *Rhone-Poulenc* involved the same landfill, the same standard-form insurance contract language, and the same underlying actions at issue in this case. *See Rhone-Poulenc*, reprinted in the appendix to the County's petition, at 75a n.26.[5] Rather, CNA incorrectly asserts that the Third Circuit was not obligated to consider *Rhone-Poulenc* because that case did not address the "precise issue" involved in this case. CNA Opp. at 10.

The Third Circuit already has recognized that it must not, as CNA suggests, apply "the state decisional law to the case at hand in a narrow and mechanical fashion." *Medvecz v. Choi*, 569 F.2d 1221, 1226 n.14 (3d Cir. 1977). Rather, the Third Circuit was obligated to "scrutinize the relevant state precedents with an eye toward the broad policies and principles that underlie and are given concrete embodiment in the cases." *Id.* (citations omitted).

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[5] Indeed, because both cases involve similar and sometimes identical issues of insurance contract interpretation, the Delaware Superior Court in *Rhone-Poulenc* repeatedly cited to many of the prior decisions in this case, including *New Castle VI*, as support for its decision. *See Rhone-Poulenc*, reprinted in the appendix to the County's petition, at 58a; 63a; 65a at n.16; 72a at n.22; 75a; 75a at nn.26, 27; 76a at n.28; 78a; 78a at n.32; 79a; 84a; 84a at n.39; 85a at n.40; 86a; 86a at n.41; 88a; 89a; 90a at n.46; 92a; 93a. Further, in the nearly two dozen times the Delaware Superior Court cited to prior decisions in this case on numerous issues, the *Rhone-Poulenc* court never once disagreed with the rulings in this case (*New Castle VII* not having yet been decided).

Contrary to CNA's assertion, federal courts sitting in diversity must "look to relevant, *i.e.*, *analogous*, state court decisions" when predicting how a state's highest court would rule, not just decisions which address the "precise issue" before the federal court. *Plummer v. Abbott Laboratories*, 568 F. Supp. 920, 922 (D.R.I. 1983) (citing 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 4507, at 91 (1982)) (emphasis added).[6] Indeed, even *dicta* of lower state courts is evidence of state law to be considered by federal courts sitting in diversity. *See, e.g., Florom v. Elliott Mfg.*, 867 F.2d 570, 578-80 (10th Cir. 1989), *reh'g denied*, 879 F.2d 801 (10th Cir. 1989) (federal court of appeals prefers *dicta* of state intermediate appellate court to a later district court decision in determining state law).

Therefore, for the reasons stated in the County's petition and here, this Court should issue a writ of *certiorari* to review the judgment of the Third Circuit in *New Castle VII*.

Respectfully submitted,

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[6] *See also Sorensen v. Tenneco Oil Co.*, 609 F. Supp. 838, 839 (D.N.D. 1985) (state supreme court decisions not "exactly on point" provided sufficient precedent to allow the federal court to resolve case without certification).